Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)

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AUSTRIA

By Dietmar Roessl
In collaboration with Elisabeth Reiner

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1. The implementation of SCE Regulation 1435/2003 in Austrian legislation

1.1. Source, time and modes of implementation

The SCE Regulation has been implemented with the GenRAeG 2006, which was published on June 26, 2006, in the Austrian *Bundesgesetzblatt,* BGBl I No 104/2006. It includes the SCEG (law on SCEs) as a whole, as well as modifications of the existing federal law on cooperatives. Furthermore, the GenRAeG 2006 provides other adaptations that are necessary in order to introduce the SCE into the existing body of Austrian law: These include amendments to the *Gerichtsgebuehrengesetz* (GGG; Court Fee Act), to the *Bankwesengesetz* (BWG; Banking Act), the *Versicherungsaufsichtsgesetz* (VAG; Insurance Supervision Act) and to the *Arbeitsverfassungsgesetz*[1] (ArbVG, Law Governing the Employment System).

Due to the regulations mentioned the formation of an SCE in Austria is possible since August 18, 2006.

1.2. Structure and main contents of the regulation on SCE

The SCEG contains 33 sections and consists largely of references to national law governing joint stock companies and cooperative societies. The SCEG for instance regulates procedures for establishing an SCE, transferring the registered office of an SCE

[1] The amendments to the ArbVG have been necessary for the implementation of the directive 2003/73/EG.

to another country and defines the possible management structures of an SCE. The management functions of an SCE may be segmented into a Supervisory Board and a Management Board (two-tier structure, dualistic governance structure) or may be exercised solely by an Administrative Board (one-tier structure, monistic governance structure). For any matter on which there is no specific provision in Austrian law, the principles of the SCE Regulation apply.

The council directive 2003/72/EC of July 22, 2003, was implemented by changing the *Arbeitsverfassungsgesetz (ArbVG*).

1.3. The designated authority/ies, as required by article 78, par. 2, SCE Reg

Section 4 SCEG stipulates that for the addition of an SCE in the commercial register and other matters named in articles 7, 29, 30, 54 para 2 and 73 of the regulation, the courts of first instance for commercial matters are responsible.

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ErlRV 467 BlgNR XXIII. GP; online available on: http://www.parlament.gv.at/PG/DE/XXIII/I/I_00467/pmh.shtml (accessed 2009-12-02).

BGBl I No 104/2006.

BGBl I No 70/2008.

2. A comment on the implementation of the SCE Regulation in Austrian legislation

Currently there is **no SCE** existing in Austria.

This information is based on the interviews made and several phone calls with the Federal Ministry of Justice, which is the best official source of information in this regard. It was verified by an excerpt (December 2009) of the commercial register.

According to the information available at present there is also no concrete plan for setting up any SCE in the upcoming future.

According to the national experts that were interviewed, the most important factor for the fact that no SCE exists in Austria is the lack of necessity for the use of cooperatives in cross border activities. Without a doubt the SCE in theory offers a huge potential, but currently there is not only a lack of publicity of the SCE regulation, but also no demand on the ground.

Cooperatives that are set up in Austria mainly act in a predominantly regional way, which has to be considered as one of the main reasons for their success, even in times of difficult economic environment[2]. Another crucial point might be that cooperatives

[2] See Dellinger: Aktuelle Aenderungen im Genossenschaftsrecht (*Current amendments to the GenG*), Raiffeisenblatt 10/2006, online available on: http://www.raiffeisenblatt.at/eBusiness/rai_template1/121810312645017022-121809748930559302_126154437634825905-356740554811286736-NA-1-NA.html (accessed 2010-03-30).

traditionally are strongly linked with matters of identity (local, regional), what may be difficult to facilitate in an SCE.[3]

One possible area of application for SCEs might be for people/businesses located in border areas. In such a case, the necessity of cross border activities obviously is almost a given. Furthermore, it is of course obligatory to act in harmony with competition law, which has an especially important impact on big cooperatives with strong cross border activities – but competition law does not seem to prohibit the establishing of cooperatives. Furthermore, the back-office in the banking sector could be a possible field of application, as well as consultancy. One of the problems might be that the SCE does not offer any obvious advantage compared to national cooperatives if there is not a lot of cross border activities.

Potential stakeholders also shy away from being the frontrunner in starting up the first SCE (in Austria). It would be of help if a huge SCE would be set up as a role model, which then could cause several articles in newspapers or on TV. Also a "SCE homepage" with legal information about starting up an SCE and about the particular cooperative law in the EU-member-states would be of help to support the SCE and cooperatives in general. The public is not sufficiently informed about the legal form of the SCE, although there is information about most of the European legal forms available. Of course, the SCE is part of university education[4], but in comparison to other forms of corporate law still with low importance. If the annual number of business start-ups is taken into account it is easily understandable that the public attention tends to focus on other legal forms.[5]

Furthermore, a point to bear in mind is that the implementation acts differ from country to country, so that there are 27 possible types of SCEs in Europe. In this regard, the harmonization efforts only partially succeeded.[6]

There are significant efforts though to enhance the publicity of SCEs in Austria. The cooperative associations have media tools at their disposal. The journals "*cooperativ*" and "*Raiffeisenblatt*" are used to inform a wider public about their activities and specific questions concerning cooperatives. An interesting attempt to inform even a very young audience playfully about cooperatives has been the work-shop "*7 Zwerge Genossenschaft*[7]" within the Vienna Summer University for Kids.[8] Due to the success it is highly probable that the workshop is going to take place again this summer.

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[3] It is interesting that the situation in Germany obviously is very similar to Austria. See Fiedler: SCE-Gruendungserfahrungen in Deutschland (*SCE-start-up experiences in Germany)*, Neuer Koelner Genossenschaftswissenschaft, Band 5/1, Muenster 2009, p. 140.

[4] University of Vienna/ Department for co-operatives: Prof. Dr. Johann Brazda; WU Vienna University of Economics and Business/Resarch Institute for Co-operation and Co-operatives: Prof. Dr. Dietmar Roessl.

[5] There are approximately 15 new cooperatives per year and e.g. 3.466 private limited companies (GmbHs). See the Statistical Yearbook of the Austrian Economic Chamber, chapter 17 (Start-ups of enterprises). Online available on:
http://portal.wko.at/wk/format_detail.wk?AngID=1&StID=357405&DstID=17 (accessed 2010-03-19).

[6] See Dellinger (2006), p. 1.

[7] "7 dwarfs cooperative". The workshop based on the fairy-tale „Snow white and the 7 dwarfs". In Summer 2009.

Pertaining to the legal side of the SCE it was feared that the implementation of the Commission Directive 2003/72/EC of 22 July 2003 – supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, made by an amendment of the *Arbeitsverfassungsgesetz (*ArbVG, Law Governing the Employment System) with articles 254ff – could be problematic. The regulations are very similar to the regulations concerning the involvement of employees in the SE. Because of these strong similarities to the SE regulation, the arrangement and the regulations of the implementation itself were uncomplicated in the view of the Federal Ministry of Labour, Social Affairs and Consumer Protection (*BMASK*). The interviews exposed that the regulations about the involvement of employees do not constitute a dissuasive factor for the establishment of SCEs in Austria. This is backed by the fact that in case of starting up an SCE by natural persons only or natural persons and one legal person and if there are not more than 50 people employed, the provisions will not apply.

Generally, the implementation act of the SCE regulation is considered as very successful by the stakeholders. The fear that the SCE regulation and its implementation could be too complex did not prove to be true.

The major problems and counter-arguments for the foundation of an SCE in Austria based on the research are the lacking necessity and the low level of information about the SCE among lawyers, corporate consultants and the potentially interested public.

3. Overview of national cooperative law

3.1. Sources and legislation features

The Austrian law concerning cooperatives, short GenG, was enacted in 1873.[9] Several amendments have been made; recent ones are the *Genossenschaftsrechtsaenderungsgesetz* 2006[10] (law changing the law concerning cooperatives) and the *Unternehmensrechtsaenderungsgesetz* 2008[11] (law changing the corporate law).

There are other collaterally laws as well as ordinances concerning cooperatives:

- *Genossenschaftsrevisionsgesetz*[12] (Austrian Law concerning Cooperative Auditing)
- *Verordnung ueber die Pruefungsordnung von Genossenschaftsrevisoren*[13] (Ordinance concerning examination regulations for cooperative auditors)

[8] For more information see Brazda/Blisse: Die Genossenschaft fuer Kinder erzaehlt (*Cooperative narrated for kids)* in cooperativ 2-3/09, p. 82, Vienna 2009.
[9] RGBl 70/1873.
[10] GenRAeG 2006; published in the Austrian *Bundesgesetzblatt* (Federal Law Gazette), BGBl I Nr. 104/2006.
[11] URAeG 2008; published in the Austrian *Bundesgesetzblatt* (Federal Law Gazette), BGBl I Nr. 70/2008.
[12] GenRevG.
[13] GenRevPO.

- *Genossenschaftsverschmelzungsgesetz*[14] (Law concerning the merger of cooperatives)
- *Genossenschaftskonkursverordnung*[15] (Ordinance concerning bankruptcy of cooperatives)

3.2. Definition and aim of cooperatives

Sect 1 para 1 GenG defines what cooperatives are (see page 19). The law is applicable for associations of an unlimited number of members serving to support acquisitions and commercial activities of their members.

Since the enactment of the *Unternehmensrechtsaenderungsgesetz* 2008, the GenG (see sect 1 para 3) refers to the purposes mentioned in Art 1 para 3 of the regulation 2003/1435/EC. Therefore, from that point on, cooperatives in Austria are able to pursue also a social aim in explicit terms (until then it was also possible, but just implicitly). This is one of the main influences of the regulation 2003/1435/EG on the national law on cooperatives in Austria.

3.3. Activity

Cooperatives are able to pursue different activities. Sect 1 para 1 GenG enumerates some examples for the possible economic nature of cooperatives: Loan-, Purchase-, Sale-, Consume-, Utilization-, Exploitation-, Construction-, Residential- and Establishment Cooperatives. In a legal regard this enumeration is not significant, since other types of cooperatives like a Production Cooperative (*Produktivgenossenschaft*) might exist as well.

The *Wohnungsgemeinnuetzigkeitsgesetz* (WGG – Law concerning the non-profit making of housing) contains some special regulations for Construction-, Residential- and Establishing Cooperatives.

Generally, all economic activities are permitted. There are only some specific laws which enforce a particular legal form for their members like article 12 *Apothekengesetz* (Pharmacist Law): The business of a pharmacy is possible in the legal form of a partnership in the way of the *Unternehmensgesetzbuch*[16] (UGB – Business Enterprise Code) or as a civil law association (*GesBR – Gesellschaft buergerlichen Rechts*[17]). Another example is article 22 of the notary code (*Notariatsordnung – NO)* which only permits the establishment of a General Partnership (*Offene Gesellschaft – OG)* or a

[14] GenVerschmG.
[15] GenKonkVO.
[16] Before the *Handelsrechtsaenderungsgesetz 2005* (HaRAeG – Law changing the Commercial Code) 2005 called Handelsgesetzbuch (HGB – Austrian Commercial Code). BGBl I 2005/120.
[17] Sections 1175ff. Austrian General Civil Code (ABGB) stipulate the civil law association.

Partnership by Shares (*Kommanditgesellschaft – KG*) for a notary association. These rare restrictions do not pose a disadvantage even considering that it is e.g. of course possible that several pharmacies start-up a purchasing cooperative.

3.4. Forms and modes of setting up

Cooperatives in Austria are legal entities which arise by entry in the commercial register[18]. A cooperative can be set up by at least two persons. Cooperative members join by written declaration.

For incorporation several things are obligatory:

- *The firm name (Sect 3 para 1 subpara 1 GenG)*
- *The statutes in written form (Sect 3 para 1 subpara 2 GenG)*
- *The entry of the statutes in the commercial register (Sect 3 para 1 subpara 3 GenG)*
- *The admission assurance to the appropriate auditing association (Sect 24 GenRevG)*

3.5. Membership

The necessary minimum number of members is two. The statute has to stipulate the requirements for the membership. Individuals as well as private or public legal entities and registered partnerships are possible members of a cooperative. For admission, a written declaration of accession is needed and their acceptance by the cooperative as well as signing at least one cooperative share.

It is possible that the statutes tie the possible membership to certain personal requirements like a special profession or the residence in a certain area. Since the *GenRAeG 2006* investing members are allowed (Sect 5a para 2 subpara 1 GenG), if stipulated by the statutes. New members have to achieve the special membership requirements of the statutes, sign a written declaration of accession which then has to be accepted by the cooperative.

3.6. Financial profiles

Because of the idea of an open membership there is no minimum capital and, except for Construction-, Residential- and Establishing Cooperatives[19], there is also no legal rule

[18] The commercial register is a public index maintained by the regional courts (in Vienna by the Commercial Court Vienna, in Graz by the Regional Court for Civil Affairs Graz).

concerning the amount of the shares. Each member has to subscribe at least one share. But it is also possible – if regulated by the statutes – that the members sign more than one share, what also may have an impact on the voting rights. If there is a voting right defined by shares, it also can be limited. E.g. the maximum amount of a vote is 100, also if you sign more shares. The advantage of the voting right by shares is an incentive to sign more shares what then increases the capital of the cooperative.

3.7. Organisational profiles

The Austrian law on cooperatives stipulates two bodies that are obligatory: the General Assembly and the Management Board. If the cooperative has at least 40 employees, a Supervisory Board is obligatory as well.[20] Furthermore, each cooperative has to be a member in an auditing association (*Revisionsverband*).[21] This is an advantage and disadvantage of cooperatives simultaneously: On the one hand, the legally intended audit guarantees reliability for the cooperative members and their business partners. On the other hand though, in comparison to other legal forms the fees sometimes may cause a problem, in particular for small cooperatives. Nevertheless, it has to be considered that each legal form causes certain fees. E.g. most of the registered associations or companies of limited liability also need cost-causing legal and tax advices or marketing consultancy, although they have not to be member to an association.

The statutes have to stipulate the forms of notice of the General Assembly. E.g. it is possible through a written invitation, email and announcements in newspapers. The period for the announcement must be appropriate. The cooperative agreement can stipulate a (limited) voting right by shares, or, otherwise, each cooperative member casts one vote[22]. If the voting right depends on other parameters (like the scope of delivery), it is necessary that the principle of equality is maintained.[23] The Management Board is elected by the General Assembly or is nominated by the Supervisory Board (if there is one), if stipulated by the statutes.[24] Generally, only cooperatives member are able to be nominated.[25] If a legal person is member of the cooperative since the URAeG 2008 it is possible to vote the person who is authorized to represent the legal person. The Management Board consists of at least one person. Their nomination can be revoked by the body of nomination

[19] Sect 6 para 1 WGG. The minimum amount of the shares for Construction-, Residential- and Establishing Cooperatives is 218 €.
[20] Sect 24 para 1 GenG. Although a supervisory board is often not obligatory, the OeGV suggests establishing it anyway.
[21] The *Genossenschaftsverband* (OeGV) and the *Raiffeisenverband* are the two most important auditing associations for cooperatives in Austria.
[22] Regardless of the numbers of shares the respective member holds.
[23] Dellinger: Kommentar zum Genossenschaftsgesetz (*Commentary on the Austrian Cooperative Society Act),* Lexis Nexis, Vienna 2005, Sect 76.
[24] Art 15 para 1 GenG.
[25] Dellinger (2005), Sect 15, Rz 10.

(General Assembly or Supervisory Board) at any time.[26] It is very common that the Management Board works honorary.

3.8. Registration and control

Cooperatives arise by entry in the commercial register. Therefore, a written cooperative contract (statutes) is essential.[27] Sect 5 GenG stipulates what the cooperative contract must contain. Whereas the Austrian law also knows cooperatives with unlimited liability, right now there are only cooperatives with limited liability. Furthermore, each cooperative has to be a member in an auditing association (*Revisionsverband*)[28]. See above, cap. 3.7.

3.9. Transformation and conversion

The GenG does not include any specific rules or regulations on conversions. The Act about the merger of cooperatives (*Genossenschaftsverschmelzungsgesetz – GenVG*) stipulates in Sect 1 para 1 GenVG that only the merger of cooperatives of the same liability is possible. Sect 9 – 11 GenVG stipulate that in the case of merger all members have a special ending-right.

3.10. Specific tax treatment

There is no specific tax regime for cooperatives in Austria. The cooperative profits are subject to the corporation tax which is 25%. Contrary to limited-liability companies (*GmbH*), there is no minimum corporation tax for cooperatives if they take no profit.

The taxation of the cooperatives members acts on the income tax (*EStG)* for natural persons[29] or on the corporate income tax (*KStG*) for corporations.

As described above, cooperatives are obliged to be member in an auditing association.

A specific tax problem for cooperatives in Austria is the fact that it is impossible to get recognised as being charitable in the meaning of the *Bundesabgabenordnung* (BAO – Austrian Federal Tax Code). E.g. limited-liability companies as well as registered associations are able to get the status of “charitable” what means that they are exempt from paying corporation tax. This unequal treatment is hardly maintainable. It continues to

[26] Sect15 para 2 GenG.
[27] Sect 2 para 1 subpara 2 GenG.
[28] The *Genossenschaftsverband* (OeGV) and the *Raiffeisenverband* are the two most important auditing associations for cooperatives in Austria.
[29] If the donee is a natural person who keeps the cooperative share in her private property normally the income tax is compensated with the discount of the corporation tax.

be a competitive disadvantage for the legal form of cooperatives. Currently, the Federal Ministry of Finance (BMF) takes the opinion that cooperatives are not able to be charitable because the principal object is the delivery of their members, which apparently is incompatible with the delivery of commonality in the meaning of article 35 BAO. Even when it is now possible to start up a cooperative with social purposes it also should be possible to be charitable in the way of the BAO.

3.11. Existing draft proposing new legislation

Actually there are no existing drafts proposing new legislation concerning cooperatives.

Even the prospective amendments regarding the capital requirements for credit institutions could have an impact to cooperative equity.

3.12. Essential bibliography

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4. The SCE Regulation and national law on cooperatives

The GenRAeG 2006 among other things provides some adaptations that are necessary in order to introduce the SCE into the existing body of Austrian law: These adaptions include amendments to the *Gerichtsgebuehrengesetz* (GGG; Court Fee Act), to the *Bankwesengesetz* (BWG; Banking Act), to the *Versicherungsaufsichtsgesetz* (VAG; Insurance Supervision Act) and to the *Arbeitsverfassungsgesetz* (ArbVG, Law Governing the Employment System).[30]

The implementation of the SCE regulation within the GenRAeG 2006 as well as the URAeG 2008 also has been the trigger factor for some remarkable changes in the GenG itself. Although the GenG generally is affected by the right of self-regulation ("*Satzungsautonomie*"), the cooperative associations wanted to ensure with the amendments that national cooperatives stay attractive in comparison to the SCE.

- *Section 5a para 2 Z 1 GenG* now clarifies that investing members[31] are explicitly allowed to join a cooperative.[32] Unlike article 28 SCEG the GenG does not stipulate a limited voting right of the investing members. This rule is a compulsory rule, what means that the statutes can admit a limitation.[33]
- *Section 5a para 2 Z GenG* creates the possibility that the cooperative agreement can fix a minimum amount that must not fall below the total nominal value of the shares despite the total or partial quitting of members.[34] Prerequisite for this is that the statutes do not exlude the share's descent.[35] The OeGV has arrogated a possibility to create non-redeemable shares in connection with the possibility to acquire a share in the substance part to make sure that the cooperative's equity is not reduced in this respect.[36] Now, a kind of voluntarily minimum amount is possible.
- *Section 15 GenG* now clarifies[37] that the statutes can permit the nomination of the executive board by the supervisory board.[38]
- *Sect 24c – 24e GenG*[39] stipulates – among other things – the right of access for certain members of the supervisory board and a list of business transactions that

[30] See the explanatory remarks of the government bill, ErlRV 1421 BlgNR XXII. GP.
[31] I.e. those who do not obtain a benefit or share in the profits from cooperative services.
[32] The entry of investing members has been possible in Austria already before the GenRAeG 2006 if stipulated by the statutes.
[33] A limitation of the number of the investing members is reasonable because a preponderance of the investing members would be a contradiction to the cooperatives idea. Cf. Hofinger/Zawischa: Das Genossenschaftsrechtsaenderungsgesetz 2006 (*The GenRAeG 2006*), in Die gewerbliche Genossenschaft 1/07, Vienna 2007, p. 31.
[34] See OeGV booklet: SCE – A Comparison of the Implementation of EU Regulation No 435/2003 on Cooperatives in National Law of the EU Member States and in National Law of Non-EU Countries, CIBP, Vienna 2008, p. 64ff; ErlRV 1421 BlgNR XXII. GP, p. 22ff.
[35] See Dellinger (2006), p. 3.
[36] See OeGV booklet (2008), p. 65.
[37] See the explanatory remarks of the government bill, ErlRV 467 BlgNR XXIII. GP, p. 39.
[38] Generally the executive board is nominated by the general assembly.

aquire the supervisory board's approval. The provisions are similar to the stock corporation act and the limited liability law. Furthermore, it was adapted linguistically. Within these articles the supervisory board should be increased.

- *Sect 27 para 3 GenG* stipulates that the convention of delegates now already is possible if the cooperative has a minimum number of 500 members.[40]
- *Sect 32 GenG* now stipulates that the deadline in case of lack of a quorum only is half an hour.[41]
- *Sect 88 GenG* has put the exceeding of the purpose of the business under penalty. Sect 36 para 4 and 37 to 39 GenG referred to this provision. Such provisions are no longer appropriate, so they have been overruled by the GenRAeG 2006.[42]
- Since the enactment of the *Unternehmensrechtsaenderungsgesetz* 2008, the GenG in sect 1 para 3 refers to the purposes mentioned in Art 1 para 3 of the regulation 2003/1435/EC. Therefore, from that point on cooperatives in Austria are also able to pursue a social aim in explicit terms.[43]

Because of the right of self-regulation of cooperatives and the existing legal situation of cooperatives, Austria constitutes an attractive location to set up a cooperative. There are no legal obstacles that seriously hamper the establishment of cooperatives. Potentially inhibitive though is the impossibility for cooperatives of being "charitable" (as described under 3.10.). Particularly if there is a social purpose of the business, legal forms like the registered association ("*Verein*") and the limited liability company ("*GmbH*") pose an objective competition since they can be "charitable" in the sense of the BAO.

Additionally, the establishment of a registered association is much easier and cheaper. The registered association in fact is able to generate a profit, although this profit cannot be distributed to the members of the association. Any profit must be used for the non-commercial statutory objects. For a certain level of economic activities though the legal form of a cooperative is without question much more suitable than the registered association.[44]

One of the main features of cooperatives – the legal obligation to be a member of an auditing association – could be considered as a disadvantage because of the related costs. Nevertheless, upon closer inspection this fact emerges as one of the big benefits of cooperatives. Even if the cooperative members are not legal or financial professionals, the consulting service given by the cooperatives associations and the independent audit cause legal certainty and therefore offer guarantees for the members as well as for business partners.

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[39] Sect 24 GenG (the essential amendments happened by the GenRAeG 2006) turned too complex so the URAeG 2008 divided the provisions on several articles.
[40] Before that, it was possible until a minimum number of 1000 members. A convention of delegates is not obligatory (compulsory rule).
[41] Before this amendment, the deadline has been one hour.
[42] See the explanatory remarks of the government bill, ErlRV 1421 BlgNR XXII. GP, p. 24.
[43] Until then it was also possible, but just implicitly.
[44] In a very similar way this seems to be veritable for the EWIV too.

A reason why the annual number of new cooperatives is not a very high (approximately 15 per year[45]) is that the level of information about cooperatives and its potential benefits is to be considered as not very high. Indeed, people (especially in rural areas[46]) are aware of cooperatives but their various fields of application often are unknown. Consequently, the same applies even more to the SCE.

This difficulty might be due to the fact that most people who want to start up a company consult lawyers or corporate consultants. Unfortunately, these groups are often informed insufficiently about the legal form of cooperatives, since they are not consulted about cooperatives on a regular basis. Advices about starting-up a cooperative and the auditing in Austria are given by the cooperative associations. As a consequence, the basic level of information on cooperatives of potential stakeholders has to be very high in order to even find competent advice about cooperatives and the SCE in particular. Therefore, closer cooperation between the cooperative associations and law firms as well as the WKO might be helpful.

5. ANNEXES

A) List of Abbreviations

ABGB	Allgemeines Buergerliches Gesetzbuch (*Austrian General Civil Code*)
AktG	Aktiengesetz (*Stock Corporation Act*)
ArbVG	Arbeitsverfassungsgesetz (*Law Governing the Employment System*)
BAO	Bundesabgabenordnung (*Austrian Federal Tax Code)*
BMASK	Bundesministerium fuer Arbeit, Soziales und Konsumentenschutz (*Federal Ministry of Labour, Social Affairs and Consumer Protection)*
BWG	Bankwesengesetz (*Banking Act*)
BGBl	Bundesgesetzblatt (*Federal Law Gazette*)
BMJ	Bundesministerium fuer Justiz (*Federal Ministry of Justice*)
GesBR	Gesellschaft buergerlichen Rechts (*Civil law association*)
GGG	Gerichtsgebuehrengesetz (*Court Fee Act*)
GenG	Genossenschaftsgesetz (*Austrian Cooperative Society Act*)
GenRAeG	Genossenschaftsrechtsaenderungsgesetz 2006 (*Act Amending Cooperative Law*), BGBl I Nr. 104/2006
GesRZ	Austrian law journal for corporate law
GenVG	Genossenschaftsverschmelzungsgesetz (*Austrian Cooperative Societies Merger Act)*.

[45] Co-operative business start-ups mainly take place in the areas of energy (e.g. district heating, biomass power plant or solar power works), food marketing and consultancy. If cooperatives which take over community tasks (like children and elderly care) will be able to enforce remain to be seen.

[46] This is because of e.g. wine-grower-cooperatives, dairy cooperatives and the presence of regional banks.

GmbHG	Gesetz ueber die Gesellschaft mit beschraenkter Haftung (*Limited liability company law*)
NO	Notariatsordnung (*Notary Code)*
OeGV	Oesterreichischer Genossenschaftsverband (*Austrian Association of Cooperatives*)
OeRV	Oesterreichischer Raiffeisenverband (*Austrian Raiffeisen Association*)
RFG	Zeitschrift fuer Recht und Finanzen der Gemeinden (*Journal for law and finance of municipialities*)
SCE	Societas Cooperativa Europaea
SCEG	SCE Act
URAeG	Unternehmensrechtsaenderungsgesetz 2008 (*Company Law Amendment Act*)
BGBl	Nr. 70/2008
VAG	Versicherungsaufsichtsgesetz (*Insurance Supervising Act*)
VO	Verordnung (*Regulation*)
WKO	Oesterreichische Wirtschaftskammer (*Austrian Federal Economic Chamber*)

B) Partial translation of the most important provisions of the GenG

Comment: There is no official English translation of the GenG available. The following translation has the purpose only to provide a better understanding.

GenG available under:
http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001680

§ 1

(1) Dieses Gesetz gilt fuer Personenvereinigungen mit Rechtspersoenlichkeit von nicht geschlossener Mitgliederzahl, die im wesentlichen der Foerderung des Erwerbes oder der Wirtschaft ihrer Mitglieder dienen (Genossenschaften), wie fuer Kredit-, Einkauf-, Verkaufs-, Konsum-, Verwertungs-, Nutzungs,- Bau-, Wohnungs- und Siedlungsgenossenschaften.

(2) Mittel zur Foerderung kann auch die Beteiligung der Genossenschaft an juristischen Personen des Unternehmens-, des Genossenschafts- und des Vereinsrechts sowie an unternehmerisch taetigen eingetragenen Personengesellschaften sein, wenn diese Beteiligung der Erfuellung des satzungsmaessigen Zweckes der Genossenschaft und nicht ueberwiegend der Erzielung von Ertraegnissen der Einlage dient.

(3) Genossenschaften koennen auch die in Art. 1 Abs. 3 der Verordnung 2003/1435/EG ueber das Statut der Europaeischen Genossenschaft (SCE), ABl. Nr. L 207 S. 1, genannten Zwecke verfolgen.

Section 1

(1) This law is applicable for associations of an unlimited number of members serving to support acquisitions and commercial activities of their members (cooperatives) as well as for Loan-, Purchase-, Sale-, Consume-, Utilization-, Exploitation-, Construction-, Residential- and Establishment Cooperatives.

(2) Means of funding can also be the participation of the cooperative in a legal person of company, cooperative or association law or in registered partnerships enterprising in business, if this participation serves to realize the cooperative's constitutive aim and not mainly to obtain emblements of the capital contribution.

(3) Cooperatives can also pursue the purposes mentioned in sect 1, para 3 of the enactment 2003/1435/EG on the statute of the European Corporation (SCE), AB1. No. L 207 p. 1.

§ 2

(1) Erwerbs- und Wirtschaftsgenossenschaften koennen entweder mit unbeschraenkter oder mit beschraenkter Haftung ihrer Mitglieder errichtet werden.

(2) …

(3) …

Section 2

(1) Purchase and Commercial Cooperatives can be set up either with unlimited or limited liability of their members.

§ 3

(1) Zur Gruendung der Genossenschaft ist erforderlich:

1. die Annahme einer Genossenschaftsfirma;
2. die schriftliche Abfassung des Genossenschaftsvertrages (Statuts);
3. die Eintragung dieses Vertrages in das Firmenbuch.

(2) Der Beitritt der einzelnen Genossenschafter geschieht durch schriftliche Erklaerung.

Section 3

(1) For incorporation several things are obligatory:

1. The acceptance of the cooperative company
2. The cooperative contract (statutes) in written form
3. The entry of the statutes in the commercial register

(2) Cooperative members join by written declaration.

§ 5a

(1) Die Aufnahme in den Genossenschaftsvertrag bedarf es, wenn die Genossenschaft zulassen will

1. die Ausdehnung des Zweckgeschaefts auf Nichtmitglieder, wobei die sich aus dem § 1 Abs. 1 ergebende Beschraenkung ausdruecklich aufzunehmen ist, oder

2. die Beteiligung an juristischen Person des „Unternehmens-, des Genossenschafts- oder des Vereinsrechts oder an unternehmerisch taetigen eingetragenen Personengesellschaften.

(2) Der Genossenschaftsvertrag kann

1. vorsehen, dass Personen, die fuer die Nutzung oder Produktion der Gueter und die Nutzung oder Erbringung der Dienste der Genossenschaft nicht in Frage kommen, als investierende (nicht nutzende) Mitglieder zugelassen werden koennen;

2. unmittelbar oder mittelbar einen Sockelbetrag bestimmen, den der Gesamtnennbetrag der Geschaeftsanteile trotz gaenzlichen oder teilweisen Ausscheidens der Mitglieder nicht unterschreiten darf, wenn der Genossenschaftsvertrag die Uebertragung der Geschaeftsanteile und sonstigen aufgrund Genossenschaftsverhaeltnisses zugeschriebenen Guthaben der Genossenschafter nicht ausschliesst. Der Anspruch der ganz oder teilweise ausgeschiedenen Mitglieder auf Rueckzahlung ihrer Geschaeftsguthaben wird ausgesetzt, solange und soweit das Ausscheiden ein Absinken des Gesamtnennbetrags der Geschaeftsanteile unter diesen Sockelbetrag zur Folge haette. Eine danach moegliche Teilauszahlung ist innerhalb einer Gruppe von Personen, die zu einem bestimmten Zeitpunkt ganz oder teilweise ausgeschieden sind, aliquot nach der Hoehe der rueckzuzahlenden Geschaeftsguthaben zu verteilen.

Section 5a

(1) The accession to the cooperative contract (statute) is required if the cooperative wants to allow

1. the expansion of the application-business to non-members, however the limitation mentioned in sect 1 para 1 has to be accepted/incorporated, or

2. the holding of legal persons of company-, cooperative- or association law or of registered partnerships enterprising in business

(2) the cooperative contract is able to

1. provide that people, who are unqualified for the utilization or production of the products and for the cooperative's utilization and service delivery, are not allowed as investing (not utilizing) members.

2. determine the immediate or mediate basic amount, which is not allowed to fall below the entire amount of the share in the company despite entire or partly withdrawal of members, if the cooperative contract does not exclude the endorsement of the share and

other member's credits which are attributed due to cooperative relations. The entirely or partly withdrawn member's interest on repayment of their company credit is interrupted as long and as far as the withdrawal would entail the subsidence of the share in the company's nominal amount below the basic amount. Within one group of people, who are entirely or partly retired at a certain time, a subsequent partial repayment is possible aliquot according to the amount of the refunded company credit.

§ 15

(1) Jede Genossenschaft muss einen von der Generalversammlung aus der Zahl der Genossenschafter oder deren vertretungsbefugter Organmitglieder zu waehlenden Vorstand haben. Der Genossenschaftsvertrag kann stattdessen die Bestellung durch den Aufsichtsrat vorsehen.

(2) …

(3) …

Section 15

(1) Each cooperative is required to have a management board which is voted at the general assembly either by the cooperative members themselves or by board members who have the cooperative members' authority. The cooperative contract can determine instead that the appointment is done by the supervisory board.

§ 24

(1) Die Genossenschaft hat einen Aufsichtsrat zu bestellen, wenn sie dauernd mindestens vierzig Arbeitnehmer beschaeftigt. Dieser hat aus drei Mitgliedern zu bestehen, sofern nicht der Genossenschaftsvertrag eine hoehere Anzahl festsetzt. Dieser hat aus drei Mitgliedern zu bestehen, sofern nicht der Genossenschaftsvertrag eine hoehere Anzahl festsetzt. Die Aufsichtsratsmitglieder sind von der Generalversammlung aus dem Kreis der Genossenschafter und deren Organmitglieder, mit der Ausschluss der Vorstandsmitglieder der Genossenschaft, zu waehlen. Die Bestellung zum Aufsichtsratsmitglied kann von der Generalversammlung jederzeit widerrufen werden.

(2) …

(3) …

Section 24

(1) The cooperation has to nominate the supervisory board if it permanently engages at least 40 employees. The supervisory board has to consist of at least three members, provided that the cooperative contract does not determine a higher number. The members of the supervisory board have to be elected by the general assembly from the cooperative members and the members of an organ/administrative body. The members of the

management board are excluded. The nomination of a supervisory board member is revocable by the general assembly at any time.

§ 27

(1) …

(2) Jeder Genossenschafter hat hiebei eine Stimme, wenn nicht der Genossenschaftsvertrag etwas anderes festsetzt.

(3) …

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Section 27

(2) Every cooperative member has a voice, provided that the cooperative contract does not determine something else.

§ 76

Jedes Mitglied einer mit beschraenkter Haftung errichteten Genossenschaft haftet im Falle des Konkurses oder der Liquidation fuer deren Verbindlichkeiten, insofern der Gesellschaftsvertrag nicht einen hoeheren Haftungsbetrag festsetzt, nicht nur mit seinen Geschaeftsanteilen, sonder auch noch mit einem weiteren Betrage in der Hoehe derselben.

Section 76

In the case of insolvency or liquidation, every member of a cooperative with limited liability is liable for its obligations, not only with his/her share in the company but also with an additional amount of the same value, provided that the cooperative contract does not determine a higher liability amount.

BELGIUM

By Delphine D'Hulstère

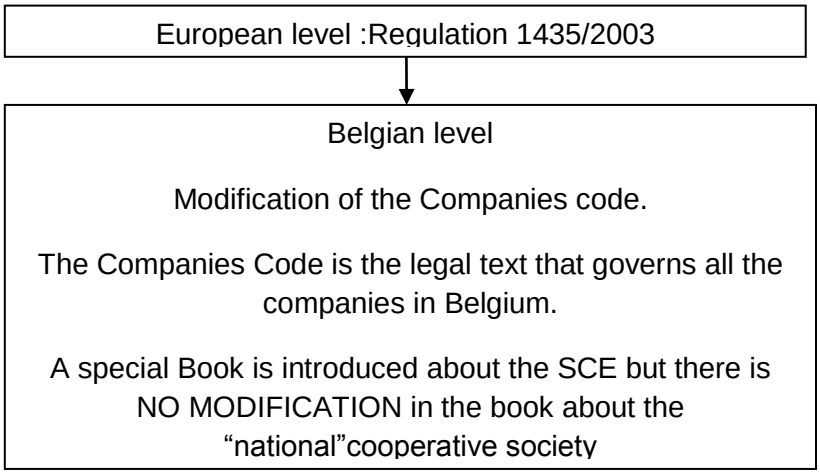
SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Belgian legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Belgian legislation. – **2.1.** Impact of the implementation on the Belgian cooperative. –**2.2.** Research on existing Belgian SCE. – **2.3.** Consultation Procedure. –**2.4.** The specific case of the social company. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.7.1** General meeting. – **3.7.2.** Administrative organ (art. 378, 379, 380, 407, 408, 409 C.C.). – **3.7.3.** Delegate for the daily management. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives. **4.1.** Relation between Regulation and national law on cooperatives. – **4.2.** Contribution of the consultation procedure. – **4.3.** Success or Failures? – **4.4.** Obstacles for the Belgian cooperatives? – **4.5.** Who can help and promote the Belgian and the European cooperative in Belgium?

1.The implementation of SCE Regulation 1435/2003 in Belgian legislation

1.1. Source, time and modes of implementation

The *Regulation 1435/2003* has been implemented in the Belgian "Companies Code", through a Royal Decree of November 28, 2006 (entered into force November 30, 2006).

That decree has integrated a book XVI "European Cooperative Society" in the Companies Code.



As its name suggests, in the first part, this code includes all the general provisions on the companies (definition, creation, accounting, liabilities, ...) then, chapter by chapter, the provisions specific to different types of companies (company anonymous, cooperative society, ...), and of course one for SCE.

The *directive of July 22, 2003 on the involvement of workers in the European Cooperative Society* has been transposed into Belgian law by a collective labour agreement No. 88 of January 30, 2007 approved by the National Labour Council.

Currently we have no official versions of these texts in English. That is why the texts are delivered in French.

See this part in the document "European cooperative law" and in "Belgian workers law".

1.2. Structure and main contents of the regulation

Here is the plan of the Book XVI about the SCE in the Belgian Companies Code :

TITLE I. – General Provisions.
CHAPTER I. – Definitions : Art. 949
CHAPTER II. – Contribution and registered office : Art. 950-951
CHAPTER III. – Non-user (investor) members: Art. 952
CHAPTER IV. – Workers Implication : Art. 953
TITLE II. - Formation.
CHAPTER I. – Formation by merger.
Section I. - Introductory provisions: Art. 954
Section II. – Procedure : Art. 955-956
Section III. - Control of legality: Art. 957-958
Section IV. – Registration and publicity: Art. 959
CHAPTER III. – Conversion of an existing cooperative into an SCE: Art. 960-962
CHAPTER IV. - Participation to an SCE by a society with an central body who is not in the Community : Art. 963
TITLE III. - Publicity formalities: Art. 964
TITLE IV. - Organs.
CHAPTER I. – Administration.
Section I. – Common provisions to the one-tier system and to the two-tier system : Art. 965-966
Section II. – One-tier system : Art. 967-968
Section III. – Two-tier system
Sub-section I. – General provisions : Art. 969-973
Sub-section II. – Management organ
I. Statute of the members of the management organ : Art. 974-975
II. Competencies and function: Art. 976-978

Sub-section III. – Supervisory organ
I. Statute of the members of the supervisory organ : Art. 979-980
II. Competencies and function: Art. 981-982
Sub-section IV. – Common provisions to the members of the management and supervisory organs
I. Remuneration. : Art. 983
II. Liability : Art. 984-986
CHAPTER II. – General meeting of the members.
Section I. – Common provisions.
Sub-section I. – Convocation of the general meeting : Art. 987
Sub-section II. – Holding of the general meeting and exercise of voting : Art. 988
Section II. – General meeting : Art. 989-990
Section III. – Voting rights : Art. 991
Section IV. – Branch or section meetings : Art. 992
CHAPTER III. - Social action and group action: Art. 993
TITLE V. - Transfer of the registered office : Art. 994-1000
TITLE VI. – Annual accounts and consolidated accounts, and control of them. Special provisions applicable to dual system: Art. 1001-1003
TITLE VIII. – Winding up, liquidation, insolvency and cessation of payments : Art. 1004-1005
TITLE IX. – Conversion of an SCE to an SC : Art. 1006-1008
TITLE X. – Penal provisions : Art. 1009-1011

The provisions of the Companies Code on the SCE should be read with the regulation, given the numerous references contained therein.

Several details of the text implemented:

- The inclusion in the Companies Code followed, wherever possible, the structure provided by the regulation.
- The Belgian law does not know the two tier system for the administration of cooperative company, this system has been introduced in the SCE book (art. 969-986 Companies Code). So, in the Book about the SCE, we find some articles that explain which competences of the administrative organ go to the management organ or to the supervisory organ :

(*literal translation)*

Art. 969. The management organ is the management council. It is composed of one or more member(s).

The supervisory organ is the supervisory council. It is composed of at least three members.

Art. 970. Subject to restrictions imposed by Regulation 1435/2003, by this Code or by the statutes, the competences of the management council and its members are the same as those of the administrative council and administrators.

Art. 971. Any reports which the property is taxed at the administrative council by this Code is established by the management organ. Unless exempted by law or more restrictive statutes, it is available in time to the supervisory organ and subject to the same rules on information and publicity as those applicable to the reports of the administrative council.

Art. 972. The management organ has the authority to perform all acts necessary or appropriate to achieve the objective, except those reserved by law to the shareholders or the supervisory organ.

The statutes list the categories of transactions that require authorization from the management organ by the supervisory organ. The supervisory organ may also submit himself to leave certain categories of transactions.

The absence of authorization of the supervisory organ is not effective against third parties.

Art. 973. If at the time of his appointment, a member of the management organ is a member of the supervisory organ, its mandate in the latter ends right upon taking office. Similarly, if at the time of his appointment, a member of the supervisory organ is a member of the management organ, its mandate in the latter ends right upon taking office.

- In various cases, the Regulation provided that member states can choose between several alternatives that have been established. Belgium has integrated most of the rules of the Regulation, except :
  - provide additional form of publication for the transfer of the registered office (art 7 §2 SCE Reg.);
  - derogate from the national provisions implementing Directive 89/666/EEC in order to take account of the specific features of cooperative (art 12 par. 2 SCE Reg.);
  - condition conversion on a favourable vote of a qualified majority or unanimity in the controlling organ of the cooperative within which employee participation is organised (35 par. 7 SCE Reg.);
  - entitle each member of the supervisory organ to require the management organ to provide information (art. 40 par. 3 SCE Reg.);
  - dictate particular provisions on operations requiring authorisation (art. 48 par. 3 SCE Reg.);
  - dictate particular provisions on the supervisory organ's quorum and decision-making (art. 50 par. 3 SCE Reg.);
  - set the minimum level of special quorum requirements (art. 61, par. 3, subpar. 2 SCE Reg);

- derogate from the national provisions implementing Directives 78/660/EEC and 83/349/EEC in order to take account of the specific features of cooperative (art. 68, par. 1 SCE reg.).

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The competent authorities under Articles 7 § 8 29 § 2 and 30 § 1 of the Regulation are notaries who have residency in Belgium (art. 957-958 Companies Code).

The competent authority within the meaning of Article 21 of the Regulation is the Minister that has Economy in his attributions (art. 954 Companies Code).

The competent authorities within the meaning of Article 54 of the Regulation are the management organ, the supervisory organ, and the “commissaires” (the ones who have the control over the accounts) (art. 987 Companies Code).

The competent authority within the meaning of Article 73 § 5 is the Commercial Court (art. 1004 Companies Code).

1.4. Essential bibliography

Comment : There is not a large bibliography in Belgium about the SCE.

Michel Coipel, Gemma Fajardo Garcia, Hagen Henrÿ, David Hiez, Simeon Karafolas, Androniki Katarahia, Rita Lolli, Wilfried Meynet, Sébastien Mock, Ian Snaith, «Droit comparé des coopératives européennes» («*Comparative Law of the European Cooperative* »), Larcier, Collection de la Faculté de Droit, d'Économie et de Finance de l'Université du Luxembourg (*Collection of the Faculty of Law, Economics and Finance from the University of Luxembourg*), Bruxelles, 2009.

Avis 41.493/2 de la section de législation du Conseil d’Etat du 13 novembre 2006 (*Notice 41493 / 2 of the Legislation Section of the State Council of 13 November 2006.)*

Compte-rendu de la matinée d’information sur la SCE du 19 février 2008, organise par le Conseil national de la Coopération (*Report on the morning of information on SCE's February 19, 2008, organized by the National Council for Cooperation*.)

http://economie.fgov.be/fr/binaries/ECS_report_fr_tcm326-58864.pdf

On the Ministry of Justice website:

http://www.just.fgov.be/img_justice/publications/pdf/217.pdf

2. A Comment on the implementation of the SCE Regulation in Belgian legislation

2.1. Impact of the implementation on the Belgian cooperative

First of all, it is interesting to say that the implementation has had NO impact on Belgian cooperatives. In order to implement, Belgium did not see the need to change or adapt the text of the national cooperative. So we have two texts for two different types of companies: one for the national cooperative and one for the SCE.

2.2. Research on existing Belgian SCE

The implementation of Regulation 1435/2003 has given birth to two Belgian SCE: their names are “SEEDS” and “Walkena”.

These two SCE both have an aim related to the social economy. These are new structures and they are not conversions of existing cooperatives.

Four research methods enabled us to detect these SCE:

- The official journal (le “Moniteur belge”): through the website of the Ministry of Justice of Belgium, a search engine is proposed. In a search form on the "SCE", two structures have appeared.
- Also through the website of “Moniteur belge”, a research on cooperative societies converted into another legal form is possible. More than 200 cooperatives have been converted but none had chosen a modified form in SCE.
- The National Bank of Belgium: this particular institution is responsible for collecting the annual accounts of companies. Currently, SCE has not yet filed accounts. This is not very surprising because in Belgium the first financial year may last between 12 and 24 months, which should add 7 more months, approval and filing of these early accounts.
- Internet: a search via “Google search” engine for “SCE Belgium” did not return any results

To interview the two SCE, we opted for a telephone interview. This has seemed important to have direct contact with them, as the number of Belgian SCEs is low.

The two SCE do not yet have a great deal of activity; they recently started and have no employees.

It should be noted that two other SCE will soon be created (“REP agency”[47] and “Copernic”[48]), but we do not yet know the deadline for these developments. A new view of our national register will be made around 10.07.2010 and will be communicated to you.

[47] http://rep.cfsites.org/index.php

[48] http://www.michel-edouard-leclerc.com/wordpress/archives/2006/02/coopernic-la-premiere-alliance-de-distributeurs-europeens-independants.php

2.3. Consultation Procedure

People who were interviewed are people who work in a cooperative or who often work with cooperatives.

They have been contacted by e-mail, with the following questions :

- Do you know what an SCE is?

All of those interviewed seem to have an idea about what an SCE is, but they cannot explain it without conducting some research and reading the legal text. Some of them took a lot of time to answer to the questionnaire.

- Do you know the purposes of the SCE Regulation?

Here, the majority have a good idea about the purposes.

- Do you know any SCE registered in this country or a national cooperative, which is member of an SCE registered abroad?

All of those interviewed have searched in the *Moniteur belge*, the official journal, and the answered “two in the Moniteur belge”. Only one said “Less than 20”.

- Do you think your associated cooperatives or more generally the cooperative movement are aware of the SCE regulation? If not, for what reason?

The answers are different here: “No” for some of them, and “yes, with the National Council for Cooperation” for the others.

Interesting points: Without the National Council for Cooperation, how will the interviewees be aware of the SCE Regulation?

- If no SCEs have been set up or the number of existing SCEs is very low, what are the dissuasive factors of the SCE regulation?

The complexity of the legislation is often the reason.

- If no SCEs have been set up or the number of existing SCEs is very low, where does the SCE regulation fail?

There has not been good publicity about the SCE in the world of the Belgian cooperative, and also the complexity of the legislation.

- Do you think the numerous references back to national legislation lead to complexity?

“Yes” is the most frequent answer.

2.4. The specific case of the social company

In Belgium, the cooperative society could take the habit[49] of "social company" (“*société à finalité sociale*”): it is a structure that can engage in business but cannot enrich its

[49] The term “habit” (meaning label) is used to express the accurate aspect of social purpose (*à finalité sociale*) wich is not translated litterally in other languages and doesn’t refer to another legal form, but to a specific shape: we can add to a legal Belgian form of company the mention “*à finalité sociale*”. For example: A cooperative company with social purpose.

members. All profits are used to achieve the purpose (insertion of low-skilled people, environmental protection, protection of disabled people, ...).

The Belgian law implementing the SCE did not allow the SCE to use this “label” of company with social purpose[50]. The reasons expressed by the Belgian decrees refer to the fact that the EU regulation does not extend the option to "social purpose" to the SCE. We find that this argument is rather weak. First because the EU regulation does not mention the ban, and partly because the alternative "social purpose" is not against the SCE. Indeed, the cooperative shall establish operating rules of the democratic participation of workers and also operating rules to reallocate remaining assets to another company with a social purpose in the case of dissolution; these two rules are very similar to rules used in companies with a social purpose.

You may note that two Belgian structures have already contacted us to create an SCE with a social purpose; obviously the demand rises in the 'Belgian social economy', but there is no way to fill it.

3. Overview of national cooperative law

3.1. Sources and legislation features

The cooperative is governed by the Belgian Companies Code (“*Code des sociétés*”[51]), abbreviated “C.C.”.

The cooperative society is mentioned in Book VII of the Code, articles 350 to 436.

Currently we have no official versions of these texts in English. That is why the texts are delivered in French.

See this part in the document “Belgian cooperative law”

However, we have tried to translate as well as possible the main articles in English.

The main characteristics of the Belgian cooperative:

- Variable Capital
- Minimum capital (if limited liabilities) of € 18,550
- Minimum 3 members
- Transferability of shares (in principle)
- One tier system only

Here is the plan of the Book VII about the cooperative society: *(literal translation)*

TITLE I. – Common provisions to all cooperative societies

[50] Article 661, par. 1 of the Companies Code : (*literal translation*) « *Companies with legal personality set out in Article 2, § 2, with the exception of the European Society and the European Cooperative Society, are called social purpose companies when they are not dedicated to the enrichment of their associates and when their statutes* (...)».

[51] An Act of 7 May 1999 (effective 6 February 2001) introduces this Companies Code in Belgium.

CHAPTER I. - Nature and qualification: Art. 350-353
CHAPTER II. - Formation.
Section I. - Entire subscription: Art. 354
Section II. – Terms of the statutes: Art. 355
CHAPTER III. – Shares and transfer.
Section I. – General provisions: Art. 356-361
Section II. - Transfer of shares: Art. 362-365
CHAPTER IV. – Modification in the composition of the society and in the capital
Section I. - Modification in the composition of the society: Art. 366-373
Section II. – Settlement of the shares : Art. 374-376
Section III. – Modification in the release of the capital : Art. 377
CHAPTER V. - Organs and control.
Section I. – Management: Art. 378-380
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Sub-section II. – Holding of the general meeting: Art. 411-412
Sub-section III. - Modification of the object : Art. 413
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Section IV. - Social action and group action.
Sub-section I. – Social action: Art. 415
Sub-section II. – group action: Art. 416-417
CHAPTER III. - Capital.

Section I. - Capital increase: Art. 418-424
Section II. – Reduction of the fixed part of the capital: Art. 425-426
Section III. – Capital preservation
Sub-section I. – Settlement of the value of the shares: Art. 427
Sub-section II. – Distribution of profits: Art. 428-429
Sub-section III. - Financing the purchase of own shares by third parties: Art. 430
Sub-section IV. – Losses of the society: Art. 431-432
CHAPTER IV. – Penal purposes: Art. 433-434
TITLE III. - The change in the liability of shareholders of a cooperative: Art. 435-436

The cooperative may have an agreement by the “National Council for Cooperation” (NCC). A law of 20 July 1955 and a royal decree of 8 January 1962 introduce this NCC in Belgium.

See the document “Belgian NCC law”

3.2. Definition and aim of cooperatives

A cooperative is defined as a company “*which consists of members whose number and inflows are variable*.” (article 350 Companies Code).

The cooperative company is, in principle, an "open" company, where members may come and go with more or less ease.

We differentiate :

- The "*cooperative company with unlimited liability”*, characterized by the fact that the members are personally and jointly liable for debts, and secondly,
- The "*cooperative company with limited liability*" whose members are liable for debts only to the extent of their contribution.

(art.352 C.C.)

In Belgium, we do not have particular types of co-operatives, such as worker or consumer cooperatives. There is one law (Companies Code) with general rules for the co-operative.

We have no provisions on the aim of cooperatives.

In Belgium, a cooperative may be approved by the “National Council for Cooperation”. It is a structure linked to the Ministry of Economy, which was created in the 50s to "give a label" to the real cooperatives (it means co-ops that meet five principles[52]:

- Membership of voluntary members
- Democratic method of voting in general meeting
- The designation by the general meeting of members of the Board and “commissaries”

[52] Art. 5, par. 2 NCC law.

- A moderate rate of interest, limited to shares
- A dividend to members
- Indeed, many abuses had occurred and companies used the cooperative form for its flexibility.
- The Council also mandated to give its opinion on any legislation relating to cooperatives.
- Currently about 400 cooperatives are approved by the National Council for Cooperation (of 25.000 existing cooperatives in Belgium).
- The effects of the recognition by this Council are :
- a possibility to be represented in the Council, and so the co-operative represented can participate in developing an advocacy agenda for the co-operative sector
- some advantages, as the one in 3.10.

3.3. Activity

The Belgian cooperatives can perform any type of activity. The definition of the cooperative does not limit the activities or the purpose.

Historically, the consumer, agricultural and production and distribution cooperatives were very important.

Nowadays, they still exist, but with new trends such as service cooperatives (community services, services for old people, ...).

3.4. Forms and modes of setting up

There are two types of cooperatives in Belgium:

The "*cooperative company with unlimited liability"* and the "*cooperative company with limited liability*" are the two forms of cooperatives.

Which form should take the act of establishing a cooperative? Is it mandatory to go through a notary?

For cooperative company with limited liability: an authentic act is required (notary).

(*literal translation*) :

Art. 403 Companies Code: The nullity of a cooperative society with limited liability may be imposed only in the following cases:

1. *if the formation is not established in the form required;*
2. *if the statutes contain no information about the shape of the company, its name, place of its purpose, inputs, the amount of the fixed portion of its capital and identity of members;*
3. *if the object is unlawful or contrary to public policy;*

4. *if the number of members duly pledged [...] is less than three.*

For the cooperative company with unlimited liability, the constitution shall be by deed (see procedure described earlier), or by a simple contract.

In the two cases, the act is published in the "*Moniteur belge*"(official journal). The submission of those documents for publication gives legal personality.

3.5. Membership

To create a cooperative, three members are necessary (art. 351 C.C.). These members could be natural persons, companies, associations, ...

The statutes of the cooperative define the conditions to become a member (art. 366 C.C.)

Generally, it is all natural person or all organisation that is approved by the general meeting and/or by the administration.

3.6. Financial profiles

The minimum capital for a *cooperative society with limited liability* is 18.550 € (art. 390 C.C.) (Paid up for the formation: € 6.200).

For a *cooperative society with unlimited liability,* there is no minimum capital.

The fixed capital is the capital indicated in the status.

The capital is variable for the amounts that exceed the fixed capital.

The shares representing the variable capital allow associates to enter and exit without changing the statutes. Here, then, the definition of the cooperative (variability in the number of associates and inputs, art. 350 C.C.) makes sense.

The law does not specify a minimum amount for the variable part of the capital.

A cooperative can distribute dividends. There is no maximum amounts, except for the cooperatives approved by the National Council for the cooperative: they cannot distribute more than 6% net (art. 1, §2, 6° royal decree NCC).

Each year the cooperative must fill in its accounts at the Central Balance Sheet (which is the National Bank of Belgium).

3.7. Organisational profiles

Cooperatives work generally with three interlocutors:

- General meeting
- Administrative organ

- Delegate for the daily management

3.7.1. General meeting

The Companies Code requires that an assembly of the general meeting of companies takes place at least once a year to inform the members on the elements below :

- Approval of annual accounts and management report
- Approval of budget for current year
- Discharge of Directors
- Eventually, nomination and/or resignation of directors (art. 410 C.C.)

The Statutes may then choose a method of voting at the general meeting.
We see three ways to vote at the general meeting:

- "One share = one vote" (art. 382)

In this case, the member who brings the most money in the society is the one who has the most votes.

That rule is the most frequent.

- "One member = one vote", regardless of their number of shares.

Here we are in the opposite case. It is the most democratic rule: however much you bring, you still have only one vote.

The statutes have to precise this rule.

- "Each share gives one vote. But, you can't participate in voting for a number of votes exceeding one tenth of the votes attached to shares represented at the general meeting "

This rule is a mix between the first and the second. With this rule, the "little" member (the one who has only a few shares) will have more power than under "one share, one vote" but this rule doesn't go as far as "one member, one vote".

To vote in a society with a social purpose, and also for cooperative companies approved by the National Council for Cooperation, you couldn't choose "one share, one vote", but one of the two other rules.

3.7.2. Administrative organ (art. 378-379-380-407-408-409 C.C.)

A cooperative must have an administrative organ. This organ is competent for all the matters that the general meeting is not competent for, it means that he has the management and the representation of the company. There is no minimum number of meetings for the administrative organ. It depends of the administrators' will, the sectors, the activities, ...

It is designated by the general meeting. The statutes clarified the conditions to become an administrator (natural person, company, non profit organisation, members or not, ...). Concerning cooperative, Belgium doesn't have the two tier system.

3.7.3. Delegate for the daily management

There is one or more natural person(s) of the organisations who conduct the day to day management (stock management, staff management, ...).

This person is designated by the administrative organ, and must refer to this one.

3.8. Registration and control

The cooperative has a "file" in the Registry of the Commercial Court.

Any subsequent modification of statutes or any change of administrator organ will automatically involve a new publication, and so a new document in this file.

All of the official publications in the "Moniteur belge" are made by this Registry.

There is no other control for cooperative.

Cooperatives may have an agreement by National Council for Cooperation.

See 3.2. Definition

This agreement is given every four years by the Minister who has economy in his attributions.

3.9. Transformation and conversion

A. Conversion of a cooperative company in a European Cooperative Society

See articles 990 à 992 in « European general law ».

B. Any cooperative company with limited liability can become a cooperative company with unlimited liability

Art. 435 of the Companies Code "*Notwithstanding any contrary provision, the amendment of the Constitution which aims to transform a cooperative society with limited liability in a cooperative society with unlimited liability requires the unanimous agreement of members.*

Such an amendment must be recorded by deed. Notwithstanding Article 66, paragraph 3, the authentic form is not mandatory for statutory changes subsequent to the cooperative society with unlimited liability. "

C. Any cooperative company with unlimited liability can become a cooperative company with unlimited liability

Art. 436 of the Companies Code *"§ 1. Notwithstanding any contrary provision, the amendment of the Constitution which aims to transform a cooperative society with unlimited liability in a cooperative society with limited liability is decided by the General Meeting, under the conditions required for amendment of the Constitution.*

Notwithstanding Article 66, paragraph 3, such a change must be evidenced by a deed on pain of nullity. The form is also true, under penalty of nullity, be given to any subsequent change of status.

§ 2. The change was decided after the preparation of a statement summarizing the assets and liabilities of the corporation, shall at a date no earlier than three months and showing what amount of net assets. An auditor or an external auditor appointed by the members reported on the status and state whether the net assets has been overstated.

§ 3. The act declaring the establishment of a cooperative society with limited liability precise amount of the share of fixed capital, determined in accordance with Article 390.

§ 4. The limited liability applies only to the commitments of the company subsequent to the time the change is effective against third parties under Article 76.

§ 5. The directors shall be severally liable to the interested:

1 of any difference between net assets as a result of the condition and amount of fixed capital referred to in § 3;

2 of repairing the harm that is immediate and direct consequence of the apparent overstatement of net assets appearing in the aforementioned state;

3 of repairing the harm that is immediate and direct consequence of the nullity resulting from a violation of § 1 paragraph 2. "

D. Any cooperative can be converted into another form of commercial company (société anonyme, SPRL, ...)

Articles 774 and following of the Companies:

Article 776. "*Before the transformation, a state is prepared summarizing the assets and liabilities of the company, agreed to a date no earlier than three months.*

When in companies other than partnerships and cooperative societies with unlimited liability, net assets is less than the capital incorporated in the state above the state mention in conclusion the amount of difference.

In partnerships and cooperative societies with unlimited liability, this status indicates what will be the capital of the company after its transformation. This capital may not exceed the net assets as follows from the above statement. "

Article 777. "*The commissioner or when there is no commissioner, auditor or external auditor appointed by the management or in partnerships and cooperative societies, by the general meeting, report on this state and shall indicate whether there was any overstatement of net assets.*

If the case referred to in Article 776, paragraph 2, the net assets fall below the capital included in the statement summarizing the assets and liabilities of the company, the report concluded the amount of difference. "

Article 778. "*The proposed conversion shall be a justification report prepared by the Management Authority and announced in the agenda of the meeting called to approve. A report is attached summarizing the state of assets and liabilities of the company.* "

Article 779. "*A copy of the report of the Management Authority and the Commissioner's report, the company auditor or accountant and the draft amendments to the Statutes annexed to the convening of partners in name.*

They are transmitted without delay to those who have completed the formalities required by the statutes to be admitted to the meeting.

Any member has the right to free, on production of its title, a fortnight before the meeting, a copy of these documents. "

Article 780. "*The decision of a general meeting of transforming society is void when it was taken in the absence of reports required by this chapter*. "

E. Any cooperative can be converted into a company with a social purpose

The Companies Code does not provide specific provisions here. The rules of paragraph D applies.

3.10. Specific tax treatment

There is no specific tax treatment of cooperatives, except certain provisions for cooperatives with an agreement of the National Council for Cooperation.

The advantages for a cooperative with this agreement :

- No reclassification of interest in dividend:

A tax rule requalifies interests in dividends payments if the interest rate on these deposits is higher than the market.

This rule does not apply to cooperatives approved by the Council.

- Exemption from withholding tax:

There is no tax for a member from a cooperative with the agreement of the Council on the first tranche of income dividends of € 170 (amount indexed).

- Reduced corporate tax.

All Belgian companies are subject to corporate tax. The cooperative with the agreement of the Council whose income does not exceed 322.500 € will not be taxed at "corporate tax" of 33%, but at a reduced rate:

- 24,25% on 0 € to 25.000 €
- 31% on 25.000 to 90.000 €
- 34,5% on 90.000 to 322.500 €

- Exemption of the discounts for members for purchases they have made.

3.11. Existing draft proposing new legislation

There is no existing draft proposing new legislation.

3.12. Essential bibliography

Michel De Wolf, «Les grands traits du régime juridique des sociétés coopératives» (*The main features of the legal regime of cooperative companies*), Non Marchand N°16, Liège, 2005/2, page 29.

Joachim Beddegenoots, «Le Conseil national de la Coopération: jeune de 50 ans» (*The National Council for Cooperation: 50 years young*), Non Marchand N°16, Liège, 2005/2, page 37.

Conseil National de la Coopération, « L'entrepreneuriat coopératif. Un rouage économique et social important et toujours d'actualité » (*The cooperative entrepreneurship. A cog in economic and social role, and continue to*), SPF Economie, PME, Classes Moyennes et Energie, Bruxelles, 2003.

Jacques Defourny, Michel Simon, « Les coopératives en Belgique : un mouvement d'avenir» (*Cooperatives in Belgium: a movement of future*), Editions Luc Pire, Bruxelles, 2002.

Mathieu Vanhove, « Working on the future together ;The power of co-operatives », Horizonten Series, Cera Foundation, Leuven, 2003.

4. The SCE Regulation and national law on cooperatives

4.1. Relation between SCE and national cooperative

The Belgian cooperative compared with the SCE:

- The two structures are listed in the Companies Code
- If you need three members to create a Belgian cooperative, you need (more appropriate) at least 5 in SCE
- The capital of a Belgian cooperative is nearly half of the amount that is required for SCE
- The two tier system is not well known in the Belgian cooperative world
- To create these two structures, you need an authentic act. It is also the same method of registration.
- Voting rights in general meeting does not seem to be in contradiction in both cases

As already explained, the SCE implemented in the companies code had no impact on the law about the national cooperative. They are two parts of the companies code. The influence of the implementation on the national cooperative is absent.

4.2. Contribution of the consultation procedure

National experts were interviewed while writing, including the panel of university professors, lawyers, the national council for cooperation, the main actors of the cooperative movement, the main actors of social economy, ...

Most of them wanted to take time to consult their structure, so that is why we will be unable to provide interviews of these experts for January 8. It is, for us, an indication that experts do not know the SCE very well.

As far as we know, you may note that few SCEs were created in Belgium (2).

The main reasons evocated by the experts are the numerous references to regulations in Belgian law, the fear of a new system and certainly the short time elapsed since the implementation of the Regulation.

It is encouraging that the social economy seems to be interested.

4.3. Success or failures?

It's hard to say.

Actually the only two formations of SCE in Belgium do not seem successful. But the legal Belgian framework offers the possibility to choose between a dozen forms of companies. The most chosen are the anonymous company and the company with limited liability.

The national cooperative is not often chosen. Why? Because it is a company that is not very well studied at school or known by the advisor and because the cooperatives are used for collective projects which are not the most frequent.

So, it could be an explanation why the SCE has not been very used in Belgium.

Secondly I would like to say that, in the consultation procedure, only the National Council for Cooperative has been mentioned as an informer about the SCE. We have a big problem of communication. Why only this council? Why an information on the notaries, auditor, adviser, ... have not been given? They are the experts on formation of societies.

Another question to ask is: do we need a such company in our law? Yes, we have a company who wants to have relationships with members of the Community, but are they a lot? Until now, they have not needed a SCE to have good relation, and also they have the European company.

4.4. Obstacles for the Belgian cooperatives?

In Belgium, we see no legal obstacles or limits on the activity for a co-operative.

A cooperative is a society like the other legal companies, with the same obligations and the same rights.

If there is an obstacle, it is the bad communication and publicity around the cooperative.

Cooperative are considered as old and dusty companies (seventies), and so the notaries, the advisor ... would rather advise a society with limited liability, and the teachers prefer to spend time on another company.

4.5. Who can help and promote the Belgian and the European cooperative in Belgium?

The **National Council for Cooperation** is a consultative body established by Act of July 20, 1955, establishing a National Council for Cooperation, to disseminate the principles of cooperation and maintain the cooperative ideal. It is composed by federations of cooperatives and by cooperatives. It gives advice on the rules about cooperatives (for example: it has been consulted for the implementation of the SCE). It also organizes symposiums around the cooperatives (for example: a symposium of 2009 on the best practices in the cooperatives.

The **agencies for promotion of cooperative**: These structures are in all the land, with specificities in each Region. They help especially for the formation of cooperatives and to assist them after their creation.

The **Centre for Social Economy (CSE)**: Founded in the early 1990s, the CSE pursues three major goals: the first is to develop research in the social economy, from the points of view of economic analysis, management and law; the second is to support, through its work, teaching in the area of the social economy at the University of Liège and elsewhere; and the third is to offer the community and private and public decision-makers services based on its expertise. The CES belongs to the Department of Economics of HEC-ULg, but it also works in close cooperation with the “Management” Education and Research Unit (through the Cera chair) as well as with the Institute of Human and Social Sciences.

CIRIEC (International Centre of Research and Information on the Public, Social and Cooperative Economy) is a non-governmental international scientific organization. Its objectives are to undertake and promote the collection of information, scientific research and the publication of works, on economic sectors and activities oriented towards the service of the general and collective interest: action by the State and the local and regional public authorities in economic fields (economic policy, regulation); public utilities; public and mixed enterprises at the national, regional and municipal levels; the so-called "social economy" (not-for-profit economy, cooperatives, mutuals, and non-profit organizations);

etc. In these fields CIRIEC develops activities of interest for both managers and researchers.

Financial support for cooperative projects and social economy: The bank Triodos, Cera, and support at regional level as Sowecsom for an example.

All the **Belgian Universities** propose a course for the legal studies on Company Law (and in this course, the cooperative is studied). For the Economic Studies, there is sometimes a special course on Social Economy, which studies the cooperative.

For the agricultural cooperatives, there are two **special agencies**: Walloon Federation of Agriculture and the Boerenbond.

Some of the biggest cooperatives or federation of cooperatives realize actions on this them (CERA has a foundation to impulse the collective projects, FEBECOOP realize studies and action of promotion, ARCO GROUP sponsor social projects, ...).

BULGARIA

By Diana G. Tsakova – Gadeva

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Bulgarian legislation. – **1.1.** Source, data and modes of implementation. – **1.2.** Structure and main contents of the legislative regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **2.** A comment on the implementation of the SCE Regulation in Bulgarian legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and features of the cooperative legislation. – **3.2.** Definition and objectives of the cooperative. – **3.3.** Activity. – **3.4.** Legal forms and establishment of a cooperative. – **3.5.** Membership. – **3.6.** Financial features. – **3.7.** Organisational structure. – **3.8.** Registration and control. – **3.9.** Transformation and winding up. – **3.10.** Specific tax treatment. – **3.11.** Existing draft regulatory acts regulating the activities of cooperatives. – **3.12.** Essential Bibliography. – **4.** Comparative analysis between the implementation of Regulation 1435/2003 on the SCE and the national legislation regulating the establishment and activity of cooperatives in Bulgaria. **5.** Visibility of the cooperative sector and other related issues.

1. The implementation of SCE Regulation 1435/2003 in Bulgarian legislation

SCE is a legal tool for joint development of activities of natural persons and legal entities in different member states united in the form of SCE, the main objective of which is to meet the interests and needs of its members. Regulation 1435/2003 provides relatively comprehensive stipulations regarding the legal status of the SCE, but on many occasions it refers to the national legislation of the respective member state where the SCE has its registered offices or to its statutes.

1.1. Sources, data and modes of implementation.

In view of Bulgaria's commitments as a European Union Member state to harmonise the local legislation with the Acquis Communautaire, Regulation 1435/2003 was implemented in Bulgaria through the adoption of the Law on Amendment and Supplementation of the Commercial Law (LASCL), promulgated in State Gazette, issue 104/11 December 2007. The entering into force of the LASCL also introduces two significant changes in the Bulgarian law, related to the legal form of the European Cooperative Society.

◊ Paragraph 13 of the Transitional and Concluding Provisions of the LASCL supplements the Cooperatives Law (CL) – a brand new Chapter Two "a", art. 51a – 51e is created by virtue of which Bulgaria establishes the rules on the European Cooperative Society and ensures the application of Regulation 1435/2003 in respect of the statutes of SCE.

◊ Paragraph 14 of the Transitional and Concluding Provisions of LASCL supplements the Commercial Register Law (CRL). A new Chapter Two "a", art. 31a - 31f of the CRL in effect as of 1 January 2008 is created, by virtue of which European Cooperative Societies having their registered office in the Republic of Bulgaria and their branches in accordance with Regulation 1435/2003 of the Council in respect of the statutes of the SCE should be subject to entry in the Commercial Register kept and maintained at the Registration Agency with the Minister of Justice. The Commercial Register is a unified centralised database, which contains information regarding the merchants – commercial entities, cooperatives, branches of foreign merchants and the related circumstances registered in Bulgaria, as well as any instruments related to the above listed traders are announced. The Commercial Register at the Registration Agency is public. Access to it is free and free of charge via the internet (art. 11 of the CRL).

◊ Directive 2003/72/EO of the Council, which supplements the statutes of the SCE and is an integral part of the Regulation, regarding the participation of workers and employees, is implemented through the Law on Informing and Consulting the Workers and Employees in Multinational Enterprises, Groups of Enterprises and European Companies (LICWEMNEGEEC), promulgated in the SG, issue 57/2006, in effect as of 1 January 2007. Chapter Four of the law relates specifically to workers and employees of SCE (art. 20-28). Additional provisions were passed through an amendment in the Labour Code (art. 157, 161, 333 and art. 404). The Regulation poses as a requirement to the validity of the SCE to comply with all the requirements of Directive 2003/72/EO, i.e. to have a concluded agreement with the workers and employees or the term for negotiation to have expired without a concluded agreement. According to the Directive, member states may pass standard rules for the participation of workers and employees.

1.2. Structure and main contents of the legislative regulation

The texts of the Cooperatives Law mentioning the SCE as a legal entity are scarce. The legal framework of SCE in Bulgaria is stipulated in Regulation 1435/2003, which is applied directly, without being developed further in the Cooperatives Law. On all issues related to the establishment of the Society and management bodies, the law refers directly to the provisions of the Regulation. Since the Regulation itself sometimes makes references to the national legislation or the statutes, to the SCE are applicable those provisions of the Cooperatives Law which are valid for the cooperatives in Bulgaria – for example: drawing up of the statutes, art. 2 of the Cooperatives Law; amount of the reserves fund - art. 34, para 2 of the Cooperatives Law. "The amount of the reserved fund shall be not less than 20 percent of the subscribed capital. The specific amount shall be determined by the general meeting"; the termination, liquidation and bankruptcy proceedings - art. 41-51 of the Cooperatives Law etc.

As we have already mentioned on a number of occasions, Regulation 1435/2003 makes references to the national legislation, and since SCE is not regulated comprehensively and completely in the specific law – the Cooperatives Law, the provisions of the Commercial Law regulating the joint-stock companies (AD) are applied subsidiary. For example:

◊ establishment of SCE through merger provided the latter is cross border – to an SCE having its seat on the territory of the Republic of Bulgaria the provisions of the Commercial Law on merger of joint-stock company (AD) shall apply - art. 262e - art. 263h of the Commercial Law. According to art. 262к of the Commercial Law the plan for transformation and the report of the management body are presented for announcement to the Commercial Register. The merger draft is subject to expert evaluation by an inspector appointed for each cooperative individually - art. 51a, para 3 of the Cooperatives Law, which makes references to art. 262l, para 3 of the Commercial Law, "The inspector should be a registered auditor. A natural person who during the last two years has been an auditor of the society appointing him / her, or who has made an evaluation of the non-monetary instalment cannot be an inspector. The appointed inspector cannot be elected auditor of any of the societies involved in the transformation over a period of two years after the date of the transformation." The Regulation stipulates application of the rules on the joint-stock company (AD) regarding the rights of the inspector on this issue;

◊ in respect to protection of the rights of creditors and debtors of the merging cooperatives, the Regulation again makes a reference to the domestic law on the joint-stock companies (AD) art. 263к of the Commercial Law. The Bulgarian law does not envisage special protection of the members who have opposed the merger.

◊ upon transformation of a cooperative having its registered office in the Republic of Bulgaria into European cooperative society or of European cooperative society having a registered office in the Republic of Bulgaria into a cooperative, the registry official at the Registration Agency shall appoint an inspector under art. 35, para 5 and art. 76, para 5 of Regulation (EC) 1435/2003, and again the provisions of art. 262, para 3 of the Commercial Law apply.

The text of Chapter II "a" of the Cooperatives Law itself does not contain legal norms, providing detailed legal regulation of the SCE as a legal person. Instead there are implemented bans resulting from the specific legal status of the SCE, as well as bans existing in other regulatory instruments, which are further discussed in this report.

The specifics in the implementation of the Regulation within the Bulgarian legislation are as follows:

◊ There is a ban on establishing SCE through merger between one with a registered office in another member state and a participant in the transformation that owns land in Bulgaria. (art. 51a, para 4, 1st sentence of the Cooperatives Law "A European cooperative society with registered office in another Member State, cannot be formed through merger when a participant in the merger procedure owns land in the Republic of Bulgaria");

◊ Another ban introduced for SCE with a seat in Bulgaria, owning land in Bulgaria, is to move its registered office to another member state. This ban is applied in accordance with the conditions resulting from the accession of the Republic of Bulgaria to the European Union. (art. 51a, para 4, sentence 2nd of the Cooperatives Law "A European cooperative society with registered office in the Republic of Bulgaria, owning land, cannot transfer its registered office to another Member State");

This ban results from the special provisions related to land ownership in Bulgaria set out in the Constitution and in the Law on Ownership.

We will first consider the fundamental texts of the main law – the Constitution. After the democratic changes in 1989-1990 and the passing of the Constitution of the Republic of Bulgaria in 1991, until 1 January 2007, when Bulgaria became a full member of the EU, the so-called ban of land ownership by foreigners and foreign legal entities was in effect in relation to ownership of land. (art. 22, para 1. of the Constitution, promulgated SG 56/1991: "Foreigners and foreign legal entities cannot acquire title over land except in case of inheritance by law"; art. 22, para 2 "In this case they should transfer their ownership within 3 years as of the date of acquisition"). In relation to Bulgaria's membership in the European Union, in 2005 an amendment of the texts of the Bulgarian Constitution regulating the regime of land ownership was initiated - art. 22, para 1 "Foreigners and foreign legal entities may acquire title over land under the conditions resulting from the accession of the Republic of Bulgaria to the European Union or under an international treaty, ratified, promulgated and entered into force for the Republic of Bulgaria, as well as through inheritance by law."

This principle ban was developed further in the Law on Ownership (LO) "A foreign country, international organisation and foreign legal entity may acquire a real estate in the country on the grounds of an international treaty, law or instrument of the Council of Ministers." – art. 29 para 3 of the LO, promulgated SG 31/1990. In respect to acquisition of ownership over agricultural land there is an absolute ban for foreign citizens and foreign legal entities to possess such land (art. 29, para 4 of LO).

The wording of the same article of the Law in 1996 – SG 33/1996 - completely corresponds with the Constitution – "Foreigners and foreign legal entities cannot acquire title over land in Bulgaria." This ban is not applied in the case of inheritance by law. The persons acquiring the title upon inheritance by law should transfer their ownership within 3 years as of the identification of the inheritance.

A possibility is given to foreigners and foreign legal entities to acquire the title over buildings and limited material rights over real estate in the country with the permission of the Minister of Finance, unless otherwise set out by law.

In 2000 an amendment was made to art. 29 of the Law on Ownership, and in para 3 the possibility for foreigners and foreign legal entities to acquire ownership over buildings and limited material rights over real estate in the country with the permission of the Minister of Finance was eliminated.

As we have already mentioned, in 2005 by virtue of the Law on Amendment and Supplementation of the Constitution of the Republic of Bulgaria (SG, issue 18 of 2005), a significant change was made to the constitutional regime over land in the country. Art. 22 of the Constitution states that the amendment of the text will become effective as of the date of Bulgaria's accession to the EU, i.e. 1 January 2007. By virtue of this amendment the principle ban over the acquisition of land by foreign persons is replaced with conditional admissibility. The amendments are passed in the context of fulfilment of Bulgaria's commitments in the process of the European integration to ensure conditions for the free movement of capital in accordance with the Treaty on the Establishment of the European Union. The latter are related to the lifting of the ban over the acquisition of land by foreigners under the conditions of the concluded Treaty for the Accession of the Republic of Bulgaria to the European Union (EU), which the new article 22 of the Constitution of the Republic of Bulgaria (CRB) refers to.

The Treaty on the Accession of the Republic of Bulgaria to the European Union contains transitional measures for the full liberalisation of the land market and harmonisation of the conditions under which citizens of the member states of the EU and the European Economic Area (EEA) may acquire the right of ownership and those established for Bulgarian citizens depending on the type of land use of the territory.

According to Appendix VI, item 3 of the Act on the conditions for accession of the Republic of Bulgaria and Romania and the amendments in the establishment treaties, approved by virtue of Decision No 317 of the Council of Ministers of 2005, representing an integral part of the above mentioned Accession Treaty, Bulgaria has negotiated transitional periods in respect of acquisition of agricultural land, forests and land in the forestry fund and land for a second home. These transitional periods are as follows:

1. Bulgaria has the right to keep over a period of five years as of the accession date the restrictions in its legislation, existing as of the date of signing the treaty, in respect to the acquisition of title of ownership over land for a second home by citizens of member states of the European Union, or the states parties under the Agreement creating the European Economic Area, which do not reside on its territory, as well as by legal entities, established under the legislation of the member states of the European Union or the European Economic Area. The deadline of the above restriction expires on 1 January 2012.

2. Furthermore, it is agreed that there is a possibility for Bulgaria to keep for a period of seven years as of the date of accession, the restrictions existing in its legislation as at the date of signing of the Treaty, in respect to the right to acquire title over agricultural land, forests and forest land by citizens of other member states of the European Union or the European Economic Area or by legal entities established under the legislation of the member states of the European Union or the European Economic Area. The restrictions mentioned are not applicable to self employed agricultural producers who are citizens of another member state and who would like to be established and to reside in Bulgaria. The validity of this restriction will cease on 1 January 2014.

The treaty envisages a general review of the transitional measures set out during the third year after the date of Bulgaria's accession. Then, with a unanimous decision, the Council of Europe can either shorten or eliminate these deadlines.

In fulfilment of its commitments and in compliance with the requirements for harmonisation of the regulatory instruments with the Constitution, Bulgaria has passed an amendment in the regulations of the Law on Ownership related to ownership over land. The amendment of art. 29, in effect as of 24 March 2007, effective at present as well, reads:

"Para 1. Foreigners or foreign legal entities may acquire the right of ownership over land under the conditions of an international treaty, ratified as provided for in art. 22, para 2 of the Constitution of the Republic of Bulgaria, promulgated and entered into force, and foreigners – also upon inheritance by law.

Para 2. Citizens from the European Union member states, or the states parties under the Agreement Establishing the European Economic Area, may acquire the right of ownership over land provided the requirements set out by law have been met, in accordance with the conditions of the Treaty on the Accession of the Republic of Bulgaria to the European Union.

Para 3. Legal entities from the European Union member states, or the states parties under the Agreement Establishing the European Economic Area, may acquire the right of ownership over land as provided for in para 2."

A new art. 29a. was created, in accordance with which "The persons under art. 29, para 2 (Citizens of European Union member states, or the states parties under the Agreement Establishing the European Economic Area, may acquire the right of ownership over land in compliance with the requirements set out by law, in accordance with the conditions of the Treaty of the Accession of the Republic of Bulgaria to the European Union."

In view of the priority given to the regulatory instruments in the Republic of Bulgaria and the already mentioned requirement for correspondence with the provisions of the Constitution, the Cooperatives Law, through which SCE was introduced in the Bulgarian legislation, was conformed with the Constitution and the Law on Ownership. Therefore the bans in art. 51a, para 4, sentence 1 and 2 in the Cooperatives Law are in place. After the expiration of the above mentioned transition periods there would be no impediments for the establishment through merger of a European Cooperative Society having a registered office in another member state, when a participant in the conversion owns land in the Republic of Bulgaria, as well as a European Cooperative Society having a registered office in the Republic of Bulgaria and owning land will be able to move its registered office to another member state.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg

In relation to the obligation resulting from art. 78, para 2 of the Regulation the competent authorities in the Republic of Bulgaria are as follows:

◊ under art. 7, 21, 29 and 30 of the Regulation – the special administrative body making the entry, announcement, check for conformity with the law of the SCE having its registered office on the territory of the Republic of Bulgaria is the Registration Agency in accordance with the Commercial Register Law. In particular this is the registry official at the Registration Agency (art. 31 b, para 2 of the CRL "In case of registration of the formation of a European cooperative society with registered office in the Republic of Bulgaria the registration official shall verify also whether the involved cooperatives with registered offices in the Republic of Bulgaria have met the requirements of Regulation (EC) 1435/2003."); Upon issue of certificates of lawfulness the registrar officer checks ex-officio whether the society or cooperative having a seat in the Republic of Bulgaria owns land. (art. 31 c, para 5 "When issuing a certificate under para 1 – 4 the registration official shall check ex-officio whether the company or the cooperative with registered office in the Republic of Bulgaria owns land.");

◊ under art. 54 of the Regulation – the competent body to summon a general meeting of the SCE is the district court at the registered office of the SCE (art. 51 b of the Cooperatives Law "If the management body fails to convene a general meeting within one month from submission of the request of the supervisory body thereof, it shall be convened by the District court where the registered office of the European cooperative society is set");

◊ under art. 73 of the Regulation – the competent body to terminate the SCE is again the district court at the registered office of the SCE, while the court may be requested to do so also by the prosecutor (art. 51e of the Cooperatives Law "The District court by registered office of the European cooperative society, including upon request by a public prosecutor, shall dissolve the society in case of violation of art. 73, para 1 and 2 of Regulation (EC) 1435/2003, if the violation was not eliminated within the term specified by the court"). In this case there are no differences to the established legal order for termination of a cooperative in accordance with the provisions of the Cooperatives Law.

As we have already mentioned on a number of occasions, Regulation 1435/2003 makes references to the national legislation, and since SCE is not regulated comprehensively and completely in the specific law – the Cooperatives Law, the provisions of the Commercial Law regulating the joint-stock companies (AD) are applied subsidiary. For example:

◊ establishment of SCE through merger provided the latter is cross border – to an SCE having its seat on the territory of the Republic of Bulgaria the provisions of the Commercial Law on merger of joint-stock company (AD) shall apply - art. 262e - art. 263h of the Commercial Law. According to art. 262к of the Commercial Law the plan for transformation

and the report of the management body are presented for announcement to the Commercial Register. The merger draft is subject to expert evaluation by an inspector appointed for each cooperative individually - art. 51a, para 3 of the Cooperatives Law, which makes references to art. 262l, para 3 of the Commercial Law, “The inspector should be a registered auditor. A natural person who during the last two years has been an auditor of the society appointing him / her, or who has made an evaluation of the non-monetary instalment cannot be an inspector. The appointed inspector cannot be elected auditor of any of the societies involved in the transformation over a period of two years after the date of the transformation.” The Regulation stipulates application of the rules on the joint-stock company (AD) regarding the rights of the inspector on this issue;

◊ in respect to protection of the rights of creditors and debtors of the merging cooperatives the Regulation again makes a reference to the domestic law on the joint-stock companies (AD) art. 263к of the Commercial Law. The Bulgarian law does not envisage special protection of the members who have opposed the merger.

◊ upon transformation of a cooperative having its registered office in the Republic of Bulgaria into European cooperative society or of European cooperative society having a registered office in the Republic of Bulgaria into a cooperative the registry official at the Registration Agency shall appoint an inspector under art. 35, para 5 and art. 76, para 5 of Regulation (EC) 1435/2003, and again the provisions of art. 262, para 3 of the Commercial Law apply.

2. A comment on the implementation of the SCE Regulation in Bulgarian legislation

The Regulation is not well known in Bulgaria except within a limited number of experts dealing with cooperative law. There are several reasons for that:

2.1. The Regulation has entered into force relatively recently by virtue of an amendment of the Cooperatives Law as of 1 January 2008.

2.2. The other forms of association are known better and are tested in practice.

2.3. The fact that the Regulation is not well known was confirmed in the opinions stated in the interviews. My aim was to interview experts in different areas involved in different management bodies. Based on their opinions, specific conclusions may be drawn regarding the extent of applicability of the Regulation. Two of the respondents – Temenuzhka Djurina and Georgi Kisyov are experts in the field of cooperative law. But while the work of Ms Djurina is associated with relations at the level of a national cooperative union, Mr Kisyov deals with legal issues within the scope of a regional (territorial) cooperative union and its member-cooperatives. I asked for the opinion of Ms Snezhana Lazarova in her role of president of a cooperative union and member of the Management Board of a national cooperative union. The interview with Ms Milka Hristova

was of interest to me as it expressed the opinion of a person managing both a cooperative and two different commercial entities – one limited liability company and one sole owner joint-stock company. The opinion of Mr Biser Slavkov was also of interest for several reasons. On the one hand he is the executive director of a holding company, on the other hand he is involved in scientific work and is a lecturer at UNWE (the Economics University in Sofia). Last but not least, he is not a lawyer, but a finance and accounting expert. Dr Natalia Genova was chosen because of her work at a national cooperative union which allows her to be well acquainted with cooperatives. She is also a young specialist who successfully defended a dissertation in 2009. The dissertation was focused on Bulgarian cooperatives and their role within the European Economic Area.

All respondents demonstrated awareness of Regulation 1435/2003 and the related amendments in Bulgarian legislation. They also unanimously stated doubts with respect to the awareness of the Regulation in cooperatives and the other cooperative organisations. The reason they pointed out was primarily the lack of public announcements related to the Regulation and sufficient and appropriately disseminated information as to the opportunities it provides. Some of the respondents believe that it is best to hold training courses for the presidents of the cooperatives to make them aware of the SCE.

The circumstance that the Regulation is not well known is one of the main reasons for its impeded application, as the advantages of the SCE are not taken into account. Another circumstance which all respondents agreed on and firmly believe is a factor obstructing the application of the Regulation is the mixed nature of the SCE. SCE has elements of a cooperative and of a joint-stock company. These two legal forms are clearly distinguished in Bulgaria's legislation and are regulated in two laws – Cooperatives Law and the Commercial Law. Other factors which some recognise as obstructions in the implementation of the Regulation include the required minimum amount of capital, which in their opinion is high, as well as the complicated requirements for the establishment of a SCE.

On whether references to the national legislation result in complexity of the Regulation the respondents split in half. Half of them believe that the numerous references complicate the Regulation and respectively the simplification of the Regulation would result in an increase of the number of registered SCE. The other half are of the opinion that the references do not result in complexity and the simplification of the Regulation would not impact the formation of this type of new entity.

2.4. There is no established SCE having its registered office in Bulgaria and therefore no practice exists in respect of the advantages and disadvantages of the procedure on its formation and the possibility for successful development of activities.

The lack of SCEs with registered office in the Republic of Bulgaria shows that at present the expectations of the application of the Regulation have not been met.

The interviews showed the respondents' interest in the SCE as a new legal subject in the Bulgarian law and as an opportunity for cross-border activities, as well as optimism in

the future for the SCE. The general opinion is that it is a matter of time for such societies to be established with the participation of Bulgarian cooperatives. All respondents agree that for this purpose it is necessary to promote the Regulation, to clarify the legal form of the European Cooperative Society and to indicate the advantages and possibilities this legal entity provides.

2.5. Articles published regarding SCE at present are very few and they refer to the legal nature of SCE without discussing the advantages and disadvantages of this type of legal entity. The absence of comments leads to a lack of discussion on this issue. The very few articles written on the Regulation and enclosed with this report indicate that academic circles and practicing lawyers are still discussing SCE as legal form (i.e. applicable legal norms, manner of establishment, management bodies, types of members and their rights and obligations) and have not undertaken to seek and analyse the expected positive features and respective disadvantages of this type of entity. I believe that in the future such entities will be established. Despite the apparently existing complexity due to the references from the Cooperatives Law to the Regulation and vice versa there are no actual legal impediments for the establishment and operation of a European Cooperative Society in Bulgaria. There are several legal restrictions imposed by the Bulgarian legislation with which the founders and the members of the European Cooperative Society should comply. For example – the ban on establishing SCE through merger when the remaining SCE has registered office in another member state and a participant in the conversion owns land in Bulgaria (art. 51a, para 4, sentence 1 of the Cooperatives Law), as well as the ban for an SCE with registered office in Bulgaria owning land in Bulgaria to move its registered office in another member state (art. 51a, para 4, sentence 2 of the Cooperatives Law). Both bans are discussed in detail in point 1.2 of this report. Another example is the legal restriction in the object of activities of the SCE. Cooperatives are not allowed to carry out bank and lending activities and they are not allowed to be reinsurance agents, therefore a SCE with registered office in the Republic of Bulgaria would also not be allowed to carry out these types of activities. This is so as the Law on Credit Institutions and the Insurance Code allow only legal entities registered as joint-stock companies to carry out banking and reinsurance activities.

3. Overview of national cooperative law

3.1. Sources and features of the cooperative legislation

The grounds of cooperative law can be found in the Constitution of the Republic of Bulgaria - art. 12 and art. 44, para 1 of the Constitution, stipulating the key rights of citizens to freely unite to meet and protect their interests. The right to unite is further

developed in the Cooperatives Law. The following specific legal provisions apply to the specific types of cooperatives:

- Insurance Code (promulgated, SG, issue 103/2005) – in respect to mutual insurance cooperatives;
- Law on Housing Cooperatives (promulgated SG, issue 55/1978) – in respect to housing construction cooperatives;
- Law on Integration of Disabled People (promulgated, SG, issue 81/2004) and the Rules on the Application of the LIDP (promulgated, SG, issue 115/2004) – in respect to cooperatives of disabled people;
- Decree No 343 of the Council of Ministers dated 30 December 2008 on the order to continue the activities of mutual credit cooperatives of private farmers (promulgated, SG, issue 4/2009) – in respect to credit cooperatives.

With the exception of housing construction cooperatives the Commercial Law (art. 1, para 2, item 2 of the Commercial Law) is applicable subsidiary to the other types of cooperatives. As already stated in point 1.1. of this paper, Regulation (EC) No 1435/2003 of the Council regarding the Statutes for the European Cooperative Society (SCE) has been implemented into the Bulgarian legislation through an amendment of the Commercial Law (promulgated, SG, issue 104/2007).

The Law on Informing and Consulting the Workers and Employees in Multinational Enterprises, Groups of Enterprises and European Companies already mentioned in point 1.1. already forms part of the Bulgarian legislation. It is applicable only to the European cooperative society but not to the Bulgarian cooperatives.

3.2. Definition and objectives of the cooperative

According to art. 1 of the Cooperatives Law (CL) the cooperative is a legal entity – an association of natural persons with variable capital and number of members, who, by mutual support and cooperation, carry out commercial activities to meet their economic, social and cultural interests. Under art. 54, para 3 of the CL the cooperative union is a legal entity having the status of a cooperative.

Cooperatives as a legal form are regulated for the first time in the first Commercial Act of Principality Bulgaria, approved by Decree No 93 of 18 May 1897, promulgated SG 114/1897. The regulation was provided in Chapter V "On associations", art. 239-267, which have been revoked with the passing of the first special law – the Law on Cooperative Associations (CAL), promulgated in SG 45/1907.

According to art. 3 of the CAL "cooperative associations may be established by:

1) public and private corporations and cooperative associations;

2) natural persons, if at least seven, who are Bulgarian subjects, possess civil rights, have not been sentenced for interest charging, are not subject to court investigation and dispose of their properties."

By virtue of art. 64 of the CAL for the first time the Bulgarian law envisaged the creation of cooperative unions – "cooperative associations may form unions". Members of a cooperative union are mainly cooperatives, with one exception regulated in art. 66 of the Law. According to this provision, the statutes of the union may (as an ultimate measure) envisage that a member of the union may be a natural person, provided this is required to fill in the composition of the management or supervisory body of the association.

The Cooperatives Law, promulgated SG 282/1948 (revoked), is the one that explicitly provides that **members of a cooperative may be only natural persons, and members of a cooperative union – only cooperatives**:

"Art. 1. (1). The cooperative is a pubic economic organisation, where an unlimited number of workers are voluntary members, having equal rights and obligations and with unlimited share capital, and which, through mutual assistance, self support and joint work aims at supporting the national economy and to meet the economic and cultural needs of its members."

This principle of membership is adopted in the subsequent cooperative laws – Cooperatives Law (prom. SG 13/1953, revoked), Law on Cooperative Organisations (prom. SG 102/1983, revoked), Cooperatives Law (prom. SG 63/1991, revoked) and the Cooperatives Law in effect at present (prom. SG 113/1999).

3.3. Activity

The principle situation is that the cooperative may carry out any activity not forbidden by law. However, there are certain limitations in the application of this principle:

- the cooperative cannot be a reinsurer – according to art 23. of the Insurance Code "a reinsurer" can only be a joint-stock company;
- the cooperative cannot carry out banking activities - art. 7, para 1. of the Law on Credit Institutions (LCI) stipulates that a bank can only be established as a joint-stock company;
- the cooperative cannot be registered as a financial institution – in accordance with art. 3a, para 1, item 1 of the LCI a financial institution can only be established as a joint-stock company, a limited liability company or a partnership limited by shares;
- a cooperative union, unlike a cooperative, cannot be recognised as "an organisation of fish and other aquatic organisms producer", art. 10, para 1 of the Law on Fishery and Aqua Cultures.

Despite this, an opportunity exists for the cooperative to form a mutual lending facility for the cooperative members. Its activity is explicitly excluded from the scope of the Law

on Credit Institutions (art. 4 of the LCI), since it is limited to granting loans only to cooperative members against contributions made by them at their own risk.

The possibility to establish credit cooperatives is envisaged in the first Law on Cooperative Associations (1907). According to art. 2, para 1, cooperative associations may be also "associations for advances and granting credits".

The Law on Banks and Credits (revoked) passed in 1992 allowed cooperatives to have banking activities. In accordance with art. 1, para 1 of the law "bank is a legal entity, established as a joint-stock company or a cooperative, which has been granted permission under the terms and conditions of this law to carry out deposit, credit and other bank transactions."

After the serious economic and financial crisis which the Republic of Bulgaria underwent in 1996-1997, a new Law on Banks (revoked) was passed in 1997, which eliminated this right of the cooperatives. According to art. 1, para 1 of the law a bank is now only a "joint-stock company, performing public drawing of deposits and using the accumulated cash to grant loans and to make investments at its own account and risk." The reasons for the passing of the draft Law on Banks do not state the specific reason for eliminating the opportunity for cooperatives to carry out deposit – lending (banking) activities.

By virtue of paragraph 17 of the Transitional and Concluding Provisions of the Law on Banks (revoked) the right of mutual assistance lending cooperatives of private agricultural farmers (MACLPAF) was kept, established under the agricultural capital fund scheme in accordance with agreements between the government of the Republic of Bulgaria and the European Commission for the utilisation of grants to provide loans to their members under the provisions of these agreements, without the requirement for a permit (license) to be issued by the Central Bank.

Upon the passing of the new Law on Credit Institutions, the restriction for banking activities of cooperatives was preserved. The reasons for that, as given in the draft law, are that in the development of the draft a fundamental role was given to the provisions of the Law on Banks passed in 1997, while at the same time the draft revises and develops further the legal framework in the regulation of banking activities.

In view of keeping the rights of MACLPAF Decree No 343 of the Council of Ministers of 30 December 2008 was passed and mentioned above. It deals with the order to continue the activities of mutual assistance lending cooperatives of private agricultural farmers (promulgated SG, issue 4/2009).

3.4. Legal forms and establishment of a cooperative

According to art. 2, para 1 of the CL, a cooperative can be established by at least 7 (seven) capable natural persons. A cooperative union can be established by at least 7

(seven) cooperatives. The raising of a minimum foundation capital is not required. It is required to hold a constituent meeting, where the statutes of the cooperative are passed and its management bodies are elected. The cooperative is established on the date of its registration in the Commercial Register kept by the Registration Agency of the Republic of Bulgaria.

Exceptions to the general rule as to the number of founding members and lack of requirement for foundation capital exist in respect to:

- housing construction cooperatives – the requirement if for at least 6 (six) natural persons, not 7, who should build at least 6 independent sites;
- mutual insurance cooperatives – where the minimum number of cooperative members is 500 (five hundred) natural persons at least 18 years of age (art. 19 of the Insurance Code). The amount of the minimum guaranteed capital to be raised, so that the cooperative can apply for a license to carry out insurance activities, is set out in accordance with Appendix No 2 to art. 80, para 3 of the Insurance Code and it depends on the number of cooperative members;
- credit cooperatives – where at least half of the members should be agricultural producers, registered under the provisions of Ordinance No 3 of 1999 on the establishment and maintenance of a register of the agricultural producers (art. 2, para 2 of the Decree). There are 33 such cooperatives which are listed explicitly in an Appendix to art. 1, para 2 of the Decree.

The specifics of the credit cooperatives lead to additional resultant requirements to this very restricted type of cooperatives. These include compulsory membership in a cooperative union of the credit cooperatives, requirements for the minimum number of members and minimum capital - art. 2, para 3 and §3, para 1 of the Transitional and Concluding Provisions (TCP) of the Decree.

It should be pointed out in respect to cooperatives of disabled people, that they are established under the general provisions of the CL, but in order to be registered as "cooperatives of disabled people" no less than a percentage of the employees of the cooperative as set out in art. 28 of the Law on Integration of People with Disabilities (LIPD) should be disabled people. The registration is made in a special register kept at the Agency for People with disabilities.

3.5. Membership

The Bulgarian legislation does not allow legal entities to be cooperative members. People, placed under full ban, are also not allowed to be cooperative members. People, placed under limited ban, as well as people who are not yet of age can be cooperative members with the prior consent of a parent or custodian.

Cooperative members can only be natural persons, of at least 16 years of age – art. 2, para 1 of the CL. Exception to this rule exists in respect of:

- mutual insurance cooperatives - a requirements of a minimum age of 18 years and concluded insurance contract with the cooperative (art. 19 of the Insurance Code);
- credit cooperatives – not less than half of the members of the credit cooperative should be agricultural producers registered under Ordinance No 3 of 1999 on the establishment and maintenance of a register of the agricultural producers (art. 2 of the Decree);
- housing construction cooperatives – at least six members are required, since it is formed for the construction of at least six separate properties.

3.6. Financial features

The cooperative is an association with a variable capital. The sum of the subscribed shares of the cooperative members forms the share capital of the cooperative. No raising of minimum subscribed capital is required to establish a cooperative. Exceptions to this rule exist for:

- mutual insurance cooperatives in view of the requirement for the accumulation of a minimum guarantee capital – art. 80, para 3 of the Insurance Code;
- credit cooperatives – minimum subscribed capital of BGN 34 000, representing approximately EUR 17 000 (§ 3 of the TCP of the Decree).

The amount of the entry, subscribed and/or membership share is determined in the statutes of the respective cooperative. It is possible for the general meeting to make a decision for additional and/or specific contributions by its members. Also by virtue of decision of the general meeting the cooperative may receive loans from its members (art. 31, para 6 and 7 of the IC).

A specific feature of the subscribed shares is that it is neither subject to restraints, not enforced execution for liabilities of the cooperative member (art. 31, para 5 of the CL.

According to art. 34 of the CL each cooperative is obliged to form an Investments Fund and a Reserves Fund, with minimum statutory amounts of 10% and 20% respectively of the subscribed capital of the cooperative. This requirement is also introduced for cooperative unions. According to art. 57 of the CL unions can also establish monetary funds for mutual support, education, qualification, etc. Each cooperative may also form a mutual fund for its members.

Although not explicitly set out in the Cooperatives Law, in essence, the funds set aside in the Reserve Fund are "non-divisible", i.e. they are not subject to distribution between the cooperative members over the period of existence of the cooperative. The amounts in the Fund are raised in accordance with the provision of art. 33, para 3 of the CL: "the profit is reduced with the deductions for the funds of the cooperative. The remaining profit is

distributed by a decision of the general assembly as dividends to the members and for other purposes, related to the activities of the cooperative." The amounts already raised in the fund may be used only to repay the liabilities of the cooperative as provided for in art. 34, para 3 of the CL: "When the cooperative closes the calendar year reporting a loss, it shall be covered with amounts from the Reserve Fund under a decision of the general assembly of the cooperative or it shall be carried forward in the following years."

The principle of "non-divisibility" is also derived from the provision of art. 14 of the Cooperatives Law. It sets out the rights of the cooperative member upon termination of his/her membership in the cooperative. No amounts from the funds of the cooperative are amongst those listed as subject to recovery.

Determining the amount of the liquidation capital of the cooperative is made upon its dissolution and liquidation. The financial result as at the time of liquidation and all reserves (including any amounts in the Reserve Fund) are united and are accounted for on the line item "other reserves". In other words, Reserve Fund ceases to exist as such with the preparation of the opening liquidation balance sheet and all amounts raised therein are used to cover the liabilities of the cooperative. The remaining amounts, following satisfaction of the creditors, are distributed among the cooperative members (art. 45 and art. 48 of CL).

One of the main rights of the cooperative members is to receive dividends – art. 9, para 1, item 6 of the CL. Since it is within the powers of the general meeting of the cooperative to distribute the profit, the general meeting may take a decision as to the capitalisation of the attributable dividend.

The general meeting makes a decision for disposal of any real estates of the cooperative and realty rights thereon – art. 15, para 4, item 10 of the CL. The activities of the cooperative with the proceeds are limited by the provision of art. 29, para 3 of the CL. According to this provision the cooperative may use the proceeds from the sale of real estates and fixed tangible assets for other purposes only after repaying its liabilities to the state and repayment of the subscribed share of former cooperative members.

It is the right of the former cooperative members or their heirs to receive the paid share, additional and specific contributions, the attributable dividend, as well as any loans granted to the cooperative, including the attached interest – art. 14 of the CL.

Upon dissolution of the cooperative through winding up the remainder of its liquidated property is distributed amongst its members pro rata to their share contributions, unless the statutes of the cooperative provide otherwise (art. 45 and art. 48 of the CL.

On the grounds of art. 40, para 1 of the Accountancy Law (AL) cooperatives, in their capacity as traders, should publish their annual financial statements, approved by the general meeting, by filing it with the Commercial Register kept at the Registration Agency.

In accordance with art. 204 Commercial Law of the bonds can only be issued by joint-stock companies or by the state.

In view of the additional question raised, neither the Cooperatives Law, nor the Accountancy Act use the term "surplus". This term is used in respect of the Republican Budget and the Budget of the State Social Security, as well as in view of determining the solvency of insurers:

“The solvency of the insurer is the availability of sufficient assets – capital and **active balance** (the amount by which the assets exceed its liabilities – i.e. "surplus”), of the insurance company, due to which it is able to meet its financial needs, including investments, surveys, etc., in order to exercise its insurance activities and meet its obligations to the insured persons.”

Cooperative use the terms "income" and "profit" but not "surplus”.

3.7. Organisational structure

The governing bodies of the cooperative are:

- general meeting – comprising all cooperative members. If their number exceeds 200 the general meeting can be held through proxies, elected according to representation norm and criteria, set out in the statutes and by virtue of decision of the management board of the cooperative, but not less than 70 people. The Cooperatives Law (CL) obliges cooperatives and cooperative unions to hold regular general meetings once a year, while for national cooperative unions the obligation is to hold such once every 4 years. The general meeting is the supreme body of the cooperative and makes decisions on all issues within its exclusive competency. The rule "one member – one vote" is kept in the decision making process (art. 19 of the CL).
- management board (MB)– its members are elected by the general meeting; the management board implements the decisions of the general meeting and directs the activities of the cooperative. It's members have a term of office of 4 years and the statutes could have provisions as to the maximum number of terms which one cooperative member can exercise as member of the MB; the president of the cooperative should be a member of the MB by law;
- president – elected by the general meeting, legal representative of the cooperative, manages its current operations and organises the implementation of the decisions of the general meeting and the MB; 4 year term of office;
- supervisory board – its members are elected by the general meeting; it supervises the operations of the cooperative and the management board; 4-year term of office.

According to art. 21, para 3 of the CL the management board has the right to establish its bodies to support its activities.

Art. 15, para 4, item 3 of the CL envisages the general assembly of the cooperative to appoint a registered auditor to perform an independent financial audit, when the annual

financial reports of the cooperative are subject to such audit under the provisions of the Accountancy Law (art. 38 of the AL).

Art. 63 of the CL envisages financial control over cooperatives, cooperative unions, cooperative and intercooperative entities to be carried out by the specialised financial control bodies within the national cooperative unions.

3.8. Registration and control

A cooperative is established on the date it is entered in the Commercial Register kept at the Registration Agency (art. 4 of the CL). The registration of cooperatives, cooperative unions and cooperative entities in the Commercial Register is exempt from the payment of fees otherwise paid by other traders. The exemption is also valid upon the entry of changes in circumstances related to the conversion, dissolution and winding up of cooperative organisations (art. 35 and art. 53, para 4 of the CL).

A cooperative of people with disabilities is given this status following its entry into a register kept by the Agency for People with Disabilities.

Financial control over cooperatives, cooperative unions, cooperative and intercooperative entities is carried out by the specialised financial control bodies within the national cooperative unions (art. 63 of the CL). According to art. 63 of the CL) each cooperative organisation is subject to such control at least once every three years, and the initiative of the check may belong to each cooperative member.

Subject to the specialised financial control carried out by the specialised bodies at the national unions is not only the business activity of the cooperative. Subsequent control on the following items is carried out during the inspections:

- fairness and objectiveness of the data presented in the annual and periodical financial statements;
- effective, economic and appropriate management of cooperative property and the expensing of funds;
- the proper implementation and compliance with the effective national accounting, tax, social security and employment legislation;
- participation in the development of the common cooperative market
- actions undertaken to eliminate weaknesses, errors, and violations in the operation of the bodies of the cooperative organisations in relation to written guidelines given for elimination of allowed violations and improvement of the work, established in prior inspections.

Part of the powers of the bodies for specialised financial control is to inform the respective cooperative and/or government authorities for undertaking measures to eliminate the existing irregularities/violations and for accountability of the guilty people.

The control on the lawful provision of funds by the CCU to the end beneficiaries under art. 81, para 1 of Decree of the Council of Ministers No 15 of 1 February 2008 is carried out by the National Audit Office of the Republic of Bulgaria.

The cooperative organisations are subject to control by the authorities of the State Financial Inspection Agency only in the cases when they are recipients of government aid or are financed with funds from the state or municipal budgets, extra budgetary accounts or funds, under international agreements or European Union programmes, while in this case control is solely in respect of the expensing of such funds (art. 4, item 7 of the Law on State Financial Inspection (LSFI).

3.9. Transformation and winding up

The Bulgarian legislation does not allow the cooperative to change its legal form of existence, nor a commercial entity to be transformed into a cooperative.

The possible forms of transformation of a cooperative are set out in art. 37 of the CL and they are as follows: merger, division and separation. No merger between a cooperative and a cooperative union is allowed, and no takeover of a cooperative by a cooperative union and vice versa is allowed.

In respect to termination of cooperatives, the general situation is stipulated in art. 40 of the CL. Six hypotheses are set out, while in three of them – art. 40, para 1, item 1, 2 and 3 of the CL – the dissolved cooperative is announced in winding up. The winding up regime of the cooperative differs from that of commercial entities. First, the termination and liquidation proceedings of the cooperative are exempt from the payment of fees to the state. A shorter period (two months instead of six) is envisaged for the statement of the claimed receivables of creditors. The receivables of the cooperative members, resulting of additional and specific contributions made under the decision of the General Assembly (GA) of the cooperative, as well as loans granted to the cooperative, compete with third-party receivables and are paid comparably. The liability of the cooperative members envisaged under the Cooperatives Law (art. 32, para 2) is up to the amount of the contributions made by them, and the statutes of the cooperative may provide a higher amount of the liability. The property remaining after satisfaction of the creditors is distributed among the cooperative members pro rata to their subscribed shares, unless the statutes of the cooperative provide otherwise and unless prior to the completion of the winding up the cooperative members do not made a decision for the cooperative to continue its operations.

It should be clarified that the terms "subscribed" and "actually paid-in" share contribution overlap in the Bulgarian Cooperative Law. The principle is that the cooperative members cannot only “subscribe” but are actually always paying the share and other contributions envisaged in the statutes of the cooperative. Payment is made at one of the

following moments – upon making the decision for admission by the management board or upon approval of the membership by the general assembly. In this sense the distribution of the residual liquidation capital between cooperative members is made proportionally to the share contributions actually paid by them.

Specific cases of termination of cooperatives are envisaged for:

- mutual insurance cooperatives;
- credit cooperatives;
- housing construction cooperatives.

3.10. Specific tax treatment

The principle of the tax treatment of cooperatives is that they are subjects equal to the other merchants. The exceptions envisaged reflect the social function of cooperatives or are related to the social activities carried out by them. Such exceptions include:

- tax relief for cooperatives under art. 187 of the Corporate Income Tax Act (CITA):

Cooperatives and cooperative entities established by them, members of cooperative unions are ceded 60% of corporate tax provided the ceded tax is only used for investment purposes. Furthermore, the ceded tax is split into two parts – 50% are used directly by the cooperative, and the remaining 50% are contributed by the cooperative to a special fund at the respective national cooperative union. This fund can be used by cooperatives to receive funds to implement investment projects and to acquire fixed tangible assets under conditions set out by the respective union. The deadline of the effect of the described legal regime is 31 December 2010.

- tax relief representing state aid to agricultural producers under art. 189b of CITA:

60% of the corporate tax is ceded to people, registered as agricultural producers, under terms and conditions set out in the legal provisions. The provisions refer mainly to agricultural cooperatives, as well as universal cooperatives having agricultural activities as well.

The provision of art. 189b of CITA envisages corporate tax to be ceded under conditions set out in the law to "tax liable persons registered as agricultural producers, for their taxable profit from activities related to production of unprocessed plant and animal production."

Under art. 189b, para 4 of CITA "corporate tax is not ceded when the person has received aid in accordance with art. 87, § 1 of the Treaty Establishing the European Community, as well as minimum aid in accordance with Regulation (EC) No 1535/2007 of the Commission dated 20 December 2007 on the application of articles 87 and 88 of the Treaty Establishing the European Community to de minimis aids in the agricultural production sector for assets under para 2, item 1." Furthermore, according to art. 190 of

CITA "the tax liable person may not use more than one tax relief under this section in one and the same year."

The legal ban on using simultaneously two tax relieves, each covering separate activities carried out by cooperatives, requires those of them that are registered as agricultural producers and carrying out production of unprocessed plant and animal production, to choose which tax relief envisaged in the CITA to use – as cooperatives under art. 187 or as agricultural producers under art. 189b.

This restriction will most probably continue to exist in the Bulgarian legislation regardless of Regulation (EC) No 800/2008 of 6 August 2008 passed by the Commission declaring certain categories of aid compatible with the common market in application of articles 87 and 88 of the Treaty (General block exemption Regulation). In particular, art. 7, para 2 of the Regulation set out the possibility that "aid exempted by this Regulation may be cumulated with any other aid exempted under this Regulation as long as those aid measures concern different identifiable eligible costs."

- tax relief for entities employing disabled people under art. 178 of CITA:

The amount of the ceded corporate tax depends on the number of disabled people employed in the respective specialised entity or cooperative in accordance with the LIDP. The ceding is targeted – for integration of disabled people and may be used over a period of time set out in art. 178 of CITA.

- subsidies under art. 81, para 1 of Decree of the Council of Ministers No 15 of 1 February 2008 – provision of funds from the Republican Budget to cover transport costs of cooperatives for delivering bread, bread products and major foods to mountain and small villages with population of up to 500 residents (excluding resorts). The funds are provided by the CCU in its capacity as administrator, through the cooperative unions and cooperatives to the end beneficiaries performing this activity, in compliance with the requirements of the Law on State Aid, the rules on its implementation and the provisions of Regulation (EC) 1998/2006 of the European Commission on the application of articles 87 and 88 of the Treaty on Minimum Aid. The ceiling of the specific measure cannot exceed the Bulgarian lev equivalent to EUR 100 000 over a period of three tax years.

3.11. Existing draft regulatory acts regulating the activities of cooperatives

None.

A draft Law on Amendment and Supplementation of the Insurance Code has been submitted for discussion by the Parliament (01 March 2010), which envisages an increase in the minimum guarantee capital for insurers.

3.12. Essential Bibliography:

1. Associate Professor Dr. Marin Galabov, *European Cooperative Society – Economic Subject in the European Union*, Economic Alternatives magazine, issue 4, 2007, page 109 – only in Bulgarian;

2. Velko Jilizov, lawyer, *Latest Supplementations to the Law on the Commercial Register*, http://ezines.zakonnik.net/2009/buletin/br_015/st_003.html - only in Bulgarian;

3. Sylvia Tsoneva, PHD in Law, Assistant Professor in Obligation Law at the New Bulgarian University, *The European Cooperative Society and Cooperative – Similarities and Differences*, http://www.nbu.bg/PUBLIC/IMAGES/File/departments/law/Spisanie/03_2009/05_tzoneva%20silvia.pdf – only in Bulgarian.

4. Central Cooperative Union, *History of the Cooperative Movement*. Second edition. Volume 1. Sofia: University Publishing House St. Kliment Ohridski, 2009. ISBN: 978-954-07-2887-2.

5. Central Cooperative Union, *History of the Cooperative Movement*. Second edition. Volume 2. Sofia: University Publishing House St. Kliment Ohridski, 2009. ISBN: 978-954-07-2888-9.

6. Central Cooperative Union, *History of the Cooperative Movement*. Second edition. Volume 3. Sofia: University Publishing House St. Kliment Ohridski, 2009. ISBN: 978-954-07-2889-6.

4. Comparative analysis between the implementation of Regulation 1435/2003 on the SCE and the national legislation regulating the establishment and activity of cooperatives in Bulgaria.

4.1. As already mentioned in point 1.2 of this paper, Regulation 1435/2003 has direct application in the Bulgarian legislation. The provisions of the Cooperatives Law have not been amended. CL was supplemented by creating a new Chapter Two “a” titled "European Cooperative Society”, thus implementing the Regulation. The provisions of Chapter Two “a” are mandatory upon formation of SCE with a registered office in the Republic of Bulgaria.

4.2. The Commercial Register Law was supplemented in the same manner – by creating a new Chapter Two “a” titled "Registration Proceedings and Order for Issuing Certificates to European Companies, European Associations by Economic Interests, European Cooperative Societies and upon Transformation with the Participation of Companies from European Union Member States of Other Countries under the European Economic Area Treaty”. The provisions of Chapter Two “a” of the Law on the Commercial

Register are mandatory for entering in the Commercial Register of a SCE with registered office in the Republic of Bulgaria.

4.3. With the aim of implementing Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees a new Law on Informing and Consulting the Workers and Employees in Multinational Enterprises, Groups of Enterprises and European Companies (LICWEMNEGEEC) was passed. The law proclaims the workers and employees' right to participate in the SCE and establishes the procedure for this participation. The procedure is unparalleled and unknown in the Bulgarian legislation; it is formulated in a complex and fairly incomprehensible way and appears to be difficult for application, thus making the law seem as an impediment for the practical implementation of the Regulation.

4.4. The reference by the Regulation to the national legislation is derived by interpretation, without any specific provisions on the application of the Regulation in the special law. In the cases of gaps in the Regulation, as in absence of regulation or in case of partial regulation, the Regulation itself refers to the national legislation. When the reference is to the regulation of cooperatives, then the provisions of the Cooperatives Law are applicable, but when the reference is to joint-stock companies, then the Commercial Law applies. If the provisions to which the Regulation refers are imperative and they have mandatory nature for the Bulgarian cooperatives, respectively joint-stock companies, then these norms are also compulsory for application in respect of a SCE with registered office in the Republic of Bulgaria. In the cases where the provisions are dispositive, i.e. they allow certain rules to be developed further or to be resolved in a different way in the Statutes of the SCE, the reference back to the Statutes allows more freedom in the regulation of such rules. The numerous references from the Regulation to the national legislation give too many possibilities for various interpretations and different choices of applicable laws which can lead to incorrect or misinterpreted applications of these norms.This comparative analysis should draw the attention to the fact that cooperatives in Bulgaria are legal entities equal to the other legal entities, private legal entities (commercial entities, sole traders, associations, etc.). There are no limitations on or stronger state control over cooperatives impeding their operations. The Cooperatives law allows cooperatives to perform any activity not forbidden by law, which means that cooperatives can have various types: agricultural, labour – manufacturing, consumer, forest, etc. Cooperatives may unite in territorial, national and other unions. The only limitations are related to performing banking and credit activities, as well as reinsurance. These activities may be performed only by legal entities having the legal form of joint-stock companies.

4.5. For the Bulgarian legislation the SCE is a combined legal subject – combination between a cooperative (set out under the Cooperatives Law) and a joint-stock company (set out under the Commercial Law).

The article of Dr Sylvia Tsoneva (PhD in Law, Assistant Professor in Obligation Law at New Bulgarian University), titled "The SCE and the cooperative – similarities and differences" considers the legal features identifying the SCE as a cooperative and the features that bring it closer to commercial entities. (The article is enclosed with this report.)

SCE bears the main characteristics of a cooperative. Amongst them are the promotion of cooperative principles and objectives, placing the membership relations in the centre of the cooperative co-relations by keeping the cooperatives' typical variable capital and number of members, equality of votes in the decision making process and formulation of specific membership rights and obligations.

Article 1 of the Cooperatives Law defines the cooperative as a legal entity carrying out commercial activities but through mutual assistance and cooperation of the members and for the purpose of meeting their economic, social and cultural interests. The objectives of the SCE are formulated similarly in article 1, paragraph 3 of the Regulation.

In both SCE and cooperatives the number of members and capital are variable. (art. 1, para 2 of the Regulation, art. 1 of the Cooperatives Law and art. 31, para 2 of the Cooperatives Law. The variable number of members and variable capital mean that the capital changes depending on the number of members and the amount of the share contributions paid by them.

The procedure for acquisition of membership in a SCE and a cooperative is identical. Membership in SCE is subject to approval by the management or administrative body (art. 14 of the Regulation), and membership in a cooperative occurs by virtue of decision of the management board (art. 8 of the Cooperatives Law. For both legal structures refusal of membership is subject to appeal before the general assembly. There is a difference for cooperatives since the decision of the management board to accept a new member must also be approved by the general assembly.

The reasons for losing membership in SCE and cooperatives are the same (art. 15 of the Regulation and art. 12 of the Cooperatives Law. The only difference between them is the opportunity given for the SCE (when such is included in its statutes) for membership to be terminated through transfer of the shares to another person. No right of transfer of shares is envisaged for Bulgarian cooperatives.

The voting right in SCE and a cooperative is also resolved in the same manner. Each member has the right to vote regardless of the number of shares held (art. 59, para 1 of the Regulation and art. 19 of the Cooperatives Law.

The similarity between the SCE and the cooperative is strengthened by the provisions of the Regulation, which refer to the Cooperatives Law. For example: art. 17 of the Regulation sets out that the formation of SCE is carried out in accordance with the applicable Cooperatives law in the Member state where the SCE has its registered address; art. 53 of the Regulation sets out that the convocation and holding of the general assembly, as well as the voting procedure are determined by the laws of the Member state in which the SCE has its registered address and which are applicable to cooperatives.

Together with these similarities to cooperatives, the SCE shares common characteristics with joint-stock companies as well. Although capital is variable, the Regulation requires a minimum amount of subscribed capital – 30 000 EUR. It is a requirement typical for capital commercial entities. Unlike the cooperatives where capital is split into shares, in SCE just like in joint-stock companies these shares have nominal value, may be split in different classes and can be transferred (art. 4, paras 2 and 3 of the Regulation).

Another similarity between a SCE and a joint-stock company in conformation with the Bulgarian legislation is the structure of the bodies. The formation of the governing bodies as one-tier or two-tier management system is typical for joint-stock companies. Completely identical for the SCE and the joint-stock companies are also the appointment and dismissal, representation, making decisions and functioning of the bodies of the two systems. Apart from the general assembly, the other bodies of the cooperative include president (managing and representing the cooperative before third parties), management board (managing the cooperative in compliance with the decisions of the general assembly) and the supervisory board (carrying out control over the activities of the management board and the chairperson).

The SCE has other specific features which are bringing it closer to a joint-stock company and are unknown for cooperatives. For example: the possibility for members of the society to be persons who have the quality of investor members (non users), as well as the right of SCE to issue securities other than shares and bonds, which grant specific preferences.

From a legal point of view, the combined nature of the SCE is not an impediment for establishment of this specific type of legal entity in the Republic of Bulgaria. Having in mind its practical application, the lack of knowledge of the Regulation and the complexity of the procedures set in it inevitably lead to the conclusion that there is a strong necessity for promotion of the Regulation and for further and in-depth clarification of the nature of the SCE and its advantages over other legal entities.

5. Visibility of the cooperative sector and other related issues.

1. Selectable subject Cooperative Law studied in Bulgarian universities.
2. National daily newspaper “Zemia”. The newspaper is issued with the participation of CCU. Two of its pages promote cooperatives and the activities carried out by them and discuss issues related to the activities of the cooperative organisations.
3. Annual COOP magazine issued by CCU. It acquaints the readers with the achievements of the consumer cooperatives and cooperative organisations within the CCU system during the past year.

4. Development by CCU of the Retail Chain COOP covering 600 shops at the end of 2009. In 2010, 100 new shops are planned to join the chain. An advantage of the retail chain is that its shops are scattered throughout the territory of the country, mainly in the small towns and villages.

5. Promotion of the COOP brand by CCU. The retail chain COOP offers 120 goods with the COOP brand in the shops. In 2010 will be increased the number of branded goods. The promotion of the brand is a key element in the retail chain's advertising as is for the whole cooperative system.

6. CCU's initiative "COOP – lets go shopping together".

CYPRUS

By Andreas Christodoulou

Summary. 1. The implementation of Regulation 1435/2003 in Cypriot legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Cypriot legislation. – **3.** Overview of the national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives. **5.** Visibility of the cooperative sector and other related issues.

1. The Implementation of SCE Regulation in Cypriot legislation

1.1. Source, time and modes of implementation

1. In December 2006, Cyprus enacted the following legislation governing the European Cooperative Society:

(i) Law 159(I)/2006, implementing Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society, published in the Official Gazette of the Republic of Cyprus on 15/12/2006.

(ii) Law 160(I)/2006 adopting Directive 2003/72/EC supplementing the statute for a European Cooperative Society with regard to the involvement of employees, published in the Official Gazette of the Republic of Cyprus on 15/12/2006.

2. Pursuant to article 8 of the SCE Regulation, an SCE registered in the Republic of Cyprus is governed by a series of Laws and Rules, the hierarchy of which is presented below:

(i) First in the hierarchy is the SCE Regulation which contains specific new rules applicable to SCEs and also references to the Cooperative Societies Law of 1985 to 2009, Cooperative Societies Rules of 1987 to 2007 and the Cypriot Companies Law (Cap. 113).

(ii) Second it is the statutes of the SCE, where the SCE Regulation expressly authorizes.

(iii) Third in the hierarchy we have the Laws that regulate the issues which remain wholly or partly uncovered by the SCE Regulation:

(a) Law 159(I)/2006 implementing SCE Regulation and Law 160(I)/2006 adopting SCE Directive.

(b) Cooperative Societies Law (CSL) of 1985 to 2009 and the Cooperative Societies Rules (CSR) of 1987 to 2007.

(c) the statutes of the SCE in the same way as for national cooperatives in Cyprus.

1.2. Structure and main contents of the regulation

Law 159(I)/2006 (hereinafter referred to as the "Law") contains all the measures and exercises those options (granted by the SCE Regulation) that are necessary in order to enable the formation of SCEs in Cyprus.

The main contents of the Law are described below:

According to article 22 of the Law, SCEs may carry on activities in any sector within the Republic[53], provided that they registered and obtain the necessary license under the relevant activity sector law, or possess equivalent license under the law of another Member State and are entitled to operate in the Republic.

Cyprus has exercised the following options granted by the Regulation:

Article 6 of the Law allows a legal entity the head office of which is not in the Community to participate in the formation of an SCE, provided that the legal body is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy.

[Article 2(2) of SCE Regulation]

Article 7 of the Law requires that SCEs registered in the Republic must have their head office and registered office at the same address.

[Article 6 of SCE Regulation]

Cyprus has extended, through article 8 of the Law the protection of the creditors (that applies in article 7(7) of the Regulation) to liabilities born before the transfer of the registered office.

[Article 7 of SCE Regulation]

Subject to article 12 of the Law, the fair value of the assets corresponding to members of cooperative societies registered under the CSL, involved in the formation of an SCE by merger, who have opposed the merger and left, distributed mutatis mutandis, in accordance with the provisions of article 49 of the CSL with regard to the liquidation of Cooperative Societies.

[Article 28(2) of SCE Regulation]

Article 13 of the Law provides that the manager of an SCE registered in the Republic either by one–tier system or by two–tier system is the secretary as the executive organ of the SCE, under the same conditions that apply to cooperative societies registered under the CSL.

[53] Republic, means the Republic of Cyprus

[Articles 37(1) & 42(1) of SCE Regulation]

According to article 14 of the Law, the members of the management organ of an SCE (in case of a two – tier system) are appointed and removed by the general meeting, under the same conditions that apply to cooperative societies registered under the CSL.

[Article 37(2) of SCE Regulation]

Article 15 of the Law specifies that the supervisory organ of an SCE may nominate one of its members to exercise the function of member of the management organ, in the event of a vacancy, for a period not exceeding three months.

[Article 37(3) of SCE Regulation]

Pursuant to article 16 of the Law, the management organ and supervisory organ in case of a two-tier system SCE and the administrative organ in the case of one-tier system SCE, registered in the Republic, may not have fewer than five members.

[Articles 37(4), 39(4) & 42(2) of SCE Regulation]

Subject to the provisions of article 17 of the Law, SCE which is registered in the Republic shall not be bound upon the acts of its organs vis-à-vis third parties, where such acts are outside the objects of the SCE, if it proves that the third party knew that the act was outside those objects or could not in the circumstances have been unaware of it.

[Articles 47(2) of SCE Regulation]

According to article 18 of the Law and without limiting the provisions of article 8 of the SCE Regulation, SCEs which are registered in the Republic are subject to the provisions of the CSL as regards the categories of transactions that require authorization from the supervisory organ to the management organ or the general meeting of members to the administrative or the management organ or a decision of the administrative or management organ.

[Articles 48(3) of SCE Regulation]

Subject to article 19 of the Law, SCEs which are registered in the Republic prepare their annual and, where applicable, the consolidated accounts under the International Accounting Standards and are obliged within six (6) months from the end of each financial year to make available to its members and the public copy of these accounts at its registered office by paying an amount not exceeding the administrative cost of the copy.

[Articles 68(1) of SCE Regulation]

It should be noted that there are options granted by the Regulation that have not been adopted by Cyprus. More precisely the options granted by articles 11(4), 12(2), 35(7), 40(3), 47(4), 50(3) have not been used.

According to article 21 of the Law, SCEs registered in Cyprus are entered in the register kept by the Commissioner for the cooperative societies registered under the CSL.

Finally, article 10 of the Law specifies that the Commissioner keeps a registry in relation to publications of documents as provided by article 12 of the Regulation.

1.3. The designated Authority/ies as required for by article 78, par. 2, SCE Reg.

Article 5 of the Law designates the Commissioner of the Authority for the Supervision and Development of Cooperative Societies (ASDCS) as the Competent Authority in relation to the implementation of all provisions of the SCE Regulation within the Republic.

Pursuant to article 78(2) of the SCE Regulation each Member State is required to designate the competent authorities for the purposes of Articles 7, 21, 29, 30, 54 and 73 of the SCE Regulation. The table below lists the relevant articles of the Law.

Table 1

Regulation 1435/2003	Article 7	Article 21	Articles 29, 30 & 54	Article 73
Competent Authority	Commissioner of the ASDCS	Commissioner of the ASDCS	Commissioner of the ASDCS	Commissioner of the ASDCS
Law 159(I)/2006	Article 5 and Article 9	Article 5 and Article 11	Article 5	Article 5 and Article 20

Cyprus has exercised (through articles 9 and 11 of the Law) the options granted by Articles 7(14) and 21 of the SCE Regulation.

It is important to note that the decisions of the Commissioner of the ASDCS in articles 9, 11 and 20 of the Law (which adopt the provisions concerning articles 7(14), 21 and 73 of the Regulation) can be reviewed by a Competent District Court of Cyprus.

According to Article 23 of the Law, the Committee of the ASDCS has powers and competences, including regulatory competences, with respect to SCE, that registered or operating within the Republic for purposes of conducting any business, including business of accepting deposits and other activities of a credit institution, business of electronic money institution, investment services, insurance brokerage and management of trusts, equivalent to the powers and competences that it has under the CSL or any other law in relation to cooperative societies and organizations registered or operating in the Republic under the CSL or any other law

Furthermore, article 24 of the Law provides that the Commissioner has powers and competences, including competences for granting operating license and supervision, with respect to SCE that registered or operating within the Republic, equivalent to the powers and competences that it has under the CSL or any other law in relation to cooperative societies and organizations registered or operating in the Republic under the CSL or any other law

Subject to Article 25 of the Law, the Commissioner has also the power to impose administrative fine that does not exceed €34.172 and in the case of repetition of the

violation of an administrative fine that does not exceed €170.860, depending on the extend of the violation, in case that it is ascertained that an SCE registered within the Republic or any person who is a member of the administrative or management or supervisory organ or employee of the SCE or any other person, violates any of the obligations imposed by the provisions of the SCE Regulation or the Law.

1.4. Essential bibliography

i) Law 159(I)/2006, implementing Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society, published in the Official Gazette of the Republic of Cyprus on 15/12/2006, Issue no. 4102, Appendix 1, Part I, page 1701.

ii) Law 160(I)/2006 adopting Directive 2003/72/EC supplementing the statute for a European Cooperative Society with regard to the involvement of employees, published in the Official Gazette of the Republic of Cyprus on 15/12/2006, Issue no. 4102, Appendix 1, Part I, page 1710.

iii) Cooperative Societies Law of 1985 to 2009.

iv) Cooperative Societies Rules of 1987 to 2007.

v) All the above Laws and Rules are available in Greek at the website of the Authority for the Supervision and Development of Cooperative Societies at www.cssda.gov.cy

2. A comment on the implementation of the SCE Regulation in Cypriot legislation

I believe that Cyprus has enacted the appropriate legislation governing the European Cooperative Societies. The SCE Regulation and the SCE Directive were transposed in Cyprus by way of Laws which, together with the Legislation applicable to Cypriot Cooperative Societies, consist the legal framework for all SCEs registered in the Republic of Cyprus.

By the accession of Cyprus to the EU, the Cooperative Societies Legislation has been fully harmonized with the EU Directives on Credit Institutions. A working group established by the ASDCS and the Cooperative Movement has an ongoing progress for the simplification, coding and modernization of the Cooperative Legislation.

Although modernization of the Cooperative Societies Law is under way, this law, as it stands today, is satisfactory for the registration and operation of cooperative societies and SCEs in Cyprus.

Despite the above measures adopted by the Cypriot legislators, no SCEs have been registered in Cyprus since today. The main reason for not establishing an SCE in Cyprus

is the local character of cooperatives and the absence of a need for cross border activities. It should be noted that there is no presence of Cypriot cooperatives in foreign markets.

It should also be noted that within the same period, no new national cooperatives have been established due to the reason that the Cooperative Movement is already well established in Cyprus after a century of operation.

The above conclusions were the outcome of the consultation with the representatives of the three Bodies of the Cooperative Movement (Pancyprian Cooperative Confederation Ltd, Cooperative Central Bank Ltd and Association of Secretary-Managers of Cooperative Institutions of Cyprus).

Finally, I believe and it is also the opinion of the interviewees, that when cooperatives in Cyprus start engaging in cross border activities there will probably be new companies established by the cooperatives under the SCE Regulation.

3. Overview of the national Cooperative Law

3.1. Sources and legislation features

Cooperative Legislation

The operation of the Cooperative Societies in Cyprus is governed by the Cooperative Societies Law of 1985 to 2009, the Cooperative Societies Rules of 1985 to 2007 and the Cooperative Societies (Establishment and Operation of the Deposit Protection Scheme) Rules of 2000 to 2009 (as regards cooperative credit institutions).

On the basis of the authorization granted by the CSL, the Committee of the ASDCS has already issued several Regulative Decisions concerning issues that have been raised under the CSL or have been designed to further comply with the EU Directives on credit institutions.

Furthermore, the Commissioner of the ASDCS has issued in May 2008 a Directive to the Cooperative Credit Institutions (“CCIs”) in accordance with article 59(4) of the Prevention and Suppression of Money Laundering Activities Law of 2007.

By the accession of the Republic of Cyprus to the EU, the Cooperative Societies Legislation has been fully harmonized with the EU Directives on credit institutions.

Cooperative Sector

The Cooperative Credit Sector constitutes the biggest sector of the Cooperative Movement of Cyprus. Currently there exist 111 CCIs with limited or unlimited liability, controlling about one fifth (1/5) of the market. CCIs offer a full range of banking services and are fully harmonized with the EU Directives.

There are also 81 non-credit limited liability cooperatives which operate in various sectors (consumer, trading of agricultural products and services).

All cooperative societies are shareholders-members of the Cooperative Central Bank Ltd (CCB). Their number is reduced dramatically since 2005 (from 358 CCIs and 104 non credit CIs) due to the on going efforts of merging.

CCIs - EU Banking Directives & Central Body Arrangements

A five-year transitional period as from January 1, 2003 was agreed upon by the EU within which all CCIs would be compliant with the Banking Directives. Numerous regulatory, structural and operational changes took place through the strong cooperation between the ASDCS, the Cooperative Central Bank (CCB) and the Pancyprian Cooperative Confederation, during the transitional period, ended 31/12/2007:

- the Cooperative Legislative and Regulatory Framework is fully harmonized with EU Directives
- CCIs' mergers were successfully performed on a big scale and
- all arrangements for the establishment of the Central Body (CB) were completed.

As from 1.1.2008 the CCB has undertaken an additional role by becoming the Central Body of CCIs. CCIs became affiliated to the CCB by applying the relevant provisions of article 3 of the Directive 2006/48/EC regarding central body arrangements, whereby CCB guarantees their obligations and the affiliated CCIs' solvency and liquidity are monitored on a consolidated basis. The affiliated CCIs maintain their autonomy and independence as separate legal entities. CCB as Central Body is legally empowered, in cooperation with the Commissioner of the ASDCS, to issue instructions on concrete management issues, to obtain information from all affiliated CCIs and to monitor them as provided in the Cooperative Legislation and the relevant Regulative Decisions issued by ASDCS. Also, the CCB provides technical support, guidance and assistance to the affiliated CCIs, including support on internal audit, risk management and credit policy

The supervisory framework of the affiliated CCIs is as follows:

- the affiliated CCIs are supervised by their own supervisory authority (the ASDCS) as stated in article 41D of the CSL;
- simultaneously, and according to article 35 of the Banking Law due to the reason that CCB is also a bank, the affiliated CCIs are subject to the provisions of the Banking Law to the extent that this is considered necessary for the Central Bank of Cyprus to exercise supervision on an aggregated basis. Therefore, the ASDCS has to provide the Central Bank of Cyprus with all the necessary data and information regarding affiliated CCIs and will participate in joint on-site examinations of the affiliated CCIs.

3.2. Definition and aim of cooperatives

According to Section 6 of the Cooperative Societies Law, a society may be registered as a Cooperative Society if its objective is to promote the financial interests of its members

in accordance with the cooperative principles, or is a society established with the objective to facilitate the operations of such societies.

The "cooperative principles" stated above aim, by the application of the principles of self-help, solidarity and helping one another, self-governing and self-supervising, the improvement of the financial, social and educational position of the members of the Cooperative Societies and the encouragement of the spirit of saving, the restriction of usury and the proper use of credit [see section 6(3) of the CSL].

Further to the above and pursuant to section 6(4) of the CSL the cooperatives aim, based on the principles therein, especially in the organization and promotion of farmer and worker credit and agricultural development, more beneficial provision of necessary equipment for farmers and workers, better use of the natural resources, more productive exploitation of the immovable property, more suitable disposal of its products and their security, development of industries supported by techno economic study, improvement of the way of living, operation of social services concerning the housing and health and the general improvement of the standard of living, social, educational and cultural standard of their members.

Moreover, section 2 of the CSL defines the Cooperative Credit Institution as the registered society, whose business is to receive deposits or other repayable funds from the public, to grant credit for its own account or to provide electronic money services and includes authorised cooperative credit institutions or credit institutions after becoming affiliated with the Central Body or other registered societies which, at the date of enactment of the CSL of 2003, carried on business that equates with the hereinabove activities, or legal entities or associations of persons that have been established as cooperative organisations in a state other than the Republic and that have the right to take up within the Republic, the activities of a cooperative credit institution.

3.3. Activity

The Cooperative Societies Law does not contain any provisions which restrict any Cooperative Society to carry on activities in any sector of the economy, provided that they registered and obtain the necessary license under the relevant activity sector Law.

As mentioned earlier there are Cooperatives in Cyprus which operate in various sectors such as the Credit Sector, Consumer, Trading of Agricultural Products and Services Sector.

As regards the Cooperative Credit Sector, Part VI A (Sections 41A to 41JB) of the CSL and Regulative Decisions provide a framework of minimum prudential standards addressing issues such as:

- Licensing Conditions
- Minimum Capital

- Capital Adequacy Ratio
- Organizational and Management Requirements
- Exposure Restrictions
- Connected Lending Limits
- Prudential Reporting
- On-site Examinations
- Administrative Sanctions
- Remedial Measures

It should be stressed also that the Annex of the CSL lists the activities and services that a CCI can carry out in Cyprus.

As regards the transactions with non-members there are the following restrictions relating to loans:

- Cooperative Societies that are not CCIs may grand loans only to depositors on the security of their deposits otherwise Commissioner's consent is required [see Sections 37(1) & 37(2) of the CSL].
- For the CCIs [in accordance with the provisions of section 37(3) of the CSL and Rule 57A of the Cooperative Societies Rules] the Committee of the ASDCS has issued a Regulative Decision (RAA 196/2005) concerning the granting of loans to non members by CCIs.

No other restrictions are included in the CSL. Each Cooperative Society has transactions with members and non members based on their by-laws that are approved by the Commissioner of the ASDCS.

3.4. Forms and modes of setting up

The registration of a society shall render it a corporate body by the name under which it is registered, with perpetual succession, and with power to hold property, to enter into contracts, to institute and defend actions and other legal proceedings, and to do all things necessary for the purposes of its establishment (Section 21 of the CSL).

3.5. Membership

Pursuant to Section 8 of the CSL, members of a Cooperative Society may only be:

(i) natural persons over eighteen years of age living or owning real property within the area of operations of the Cooperative Society and

(ii) Cooperative Societies.

No society, other than a society of which a member is a cooperative society, shall be registered under the CSL unless it consists of at least twelve persons, each of whom is

over eighteen year of age and are living or owning real property within the intended area of operations of the society seeking registration.

According to Section 8(3) of the CSL, no society established for the purpose of facilitating the operations of cooperative societies shall be registered unless at least five cooperative societies are members thereof.

CSL provides that in specific cases (i.e. for agricultural products) members are obliged to transact with the Cooperative Society. New members are accepted by the Committee of Cooperative Society if they comply with the aforementioned membership requirements.

CSL does not contain specific provisions regarding investor members. However, Section 7 of the CSL specifies that no member of a cooperative society, other than a Cooperative Society may hold more than one-fifth of the share capital of the society.

3.6. Financial Profiles

The minimum capital of a Cooperative Credit Institution is one million Euros [see Section 41B(1)(a) of CSL]. For other types of cooperatives no minimum capital is required except in cases where such requirement is provided by the relevant activities sector legislation.

Share Capital of Cooperative Societies is variable only if there is an increase (new members are obliged to acquire a share or shares in the society). According to Section 31A of the CSL, if a person ceases to be a member of a cooperative society for any reason, a refund equivalent to the value of the shares acquired and held is not allowed and therefore the ex member has to sell the shares to other existing or new members.

The provisions of the CSL (Section 41) concerning the distribution of profits are the following:

(i) At least half of the net profits of every cooperative society with limited liability shall be carried forward for the creation of a reserve fund. The remainder and any profits of past years available may be divided among the members by way of dividend or bonus, or allocated to any other fund constituted by the cooperative society.

(ii) In case of a registered society with unlimited liability the whole of the net profits shall be carried forward for the creation of a reserve fund and no distribution of profits shall be made without general or special decision of the ASDCS, if it is a cooperative society which operates as a CCI or without general or special order of the Minister of Commerce Industry and Tourism, if it is any other cooperative society.

(iii) Any registered society, whether with limited or unlimited liability, may, following a decision by the general meeting of its members, contribute to any charitable or public purpose an amount not exceeding seven and half per cent of the total net profits of the year

Furthermore, Rule 24 of the Cooperative Societies Rules prohibits cooperative societies to pay dividend on their paid-up share capital in excess of that specified in their by-laws.

In case of liquidation, Sections 49 of the CSL provides that the funds, including the reserve fund, shall be applied first to the costs of liquidation, second to the discharge of the liabilities of such society, and then to the payment of the share capital.

Furthermore, any surplus remaining after the distribution of the funds for the purposes specified above shall not be divided among the members but such surplus shall be available for the purpose or purposes described in the by-laws of the cooperative society whose registration has been canceled, and, where no purpose is so described, shall be deposited by the Commissioner in a bank or in a cooperative society and will be used as a reserve fund (under the Cooperative Societies Rules) in when a new society will be registered to operate in the same area.

Provided that, in case of liquidation of a cooperative society the members of which are cooperative societies, any surplus may be divided amongst such cooperative societies in such manner as described in the by-laws of the society whose registration has been canceled.

Pursuant to the provisions of paragraph (b) of subsection (1) of Section 41G, the Committee of the ASDCS has issued a Regulative Decision (RAA 59/2005) with regard to the preparation and publication of the Annual and Consolidated Accounts of Cooperative Credit Institutions. It should be noted that Cooperative Societies must prepare their annual accounts in accordance with the International Accounting Standards. The annual accounts of Cooperative Societies are audited by the Audit Service of Cooperative Societies as prescribed by section 19 of CSL .

There are no specific provisions in CSL regarding the issue of financial instruments by Cooperative Societies except the case of shares.

3.7. Organizational profiles

A Cooperative Society can have either a one-tier or a two-tier management structure. In the one-tier structure, there is the General Meeting and the Committee while in the two-tier there is the General Meeting, the Committee and the Supervisory Board. It is noted that the Supervisory Board is appointed when provided by the by-laws of the Society (Rule 70 of the Cooperative Societies Rules). Today only few Cooperative Societies have Supervisory Board.

According to article 15 of the Cooperative Societies Law, no member of any Cooperative Society shall have more than one vote in the conduct of the affairs of the society. (One member - One vote). Provided that, in the case of an equality of votes, the Chairman shall have a second or casting vote.

As regards the governance of CCIs, the Committee of the ASDCS has issued, pursuant to the provisions of Sections 15A and 41G(1)(e) of CSL, a Regulative Decision concerning the Framework of Principles of Operation and Criteria of Assessment of Cooperative Credit Institutions' Organization Structure, Internal Governance and Internal Control Systems.

The main objectives of the Regulatory Decision is to strengthen the general framework of organizational structure and internal governance of the CCIs as well as the upgrading of the three basic functions of internal control, ie internal audit, risk management and regulatory compliance.

Based on the Cooperative Societies Rules, the members of the Committee and of the Supervisory Board must be members of the Cooperative Society.

3.8. Registration and control

The ASDCS is responsible for registering, winding up, regulating and supervising all Cooperative Societies in Cyprus based on CSL and also for the licensing of CCIs based on Part VI of CSL. The Commissioner is the head of the ASDCS. He chairs the Committee of the ASDCS, which is composed of the Commissioner and four other members all appointed by the Council of Ministers for a term of five years. The Committee is responsible for determining the strategy and policy of the ASDCS and for the regulation of CCIs according to specific provisions of the CSL.

Subject to the provisions of the Cooperative Societies Law and Rules, Cooperative Societies in Cyprus has to be registered in the register of cooperative societies kept by the Commissioner of the ASDCS.

The ASDCS is responsible for the registration, supervision and development of Cooperative Societies in Cyprus. Three separate divisions have been established within the ASDCS:

i) Regulation and Supervision of CCIs

ii) Supervision of Non-Credit Cooperative Societies

iii) Registration and Development of Cooperative Societies

The appropriate arrangements and measures have been taken in order to ensure that no conflicts of interest and questions of accountability/liability arise.

3.9. Transformation and conversion

A Cooperative Society cannot be transformed or converted into a different legal form of enterprise except into an SCE.

3.10. Specific Tax Treatment

Pursuant to the Income Tax Law, the income of a cooperative society in relation to transactions with its members is exempted from tax.

3.11. Existing draft proposing new legislation.

A working group established by the ASDCS and the Cooperative Movement has an ongoing progress for the simplification, coding and modernization of the Cooperative Legislation. Also an external legal expert has been appointed to proceed with the drafting of the bill. The first draft of the bill has already been delivered to the ASDCS.

3.12. Essential bibliography

a) Legislation

i) Cooperative Societies Law of 1985 to 2009.
ii) Cooperative Societies Rules of 1987 to 2007.
iii) Regulative Decision 196/2005.
iv) Regulative Decision 441/2007.

All the above Laws, Rules and Regulative Decisions are available in Greek at the website of the Authority for the Supervision and Development of Cooperative Societies at www.cssda.gov.cy

b) Greek bibliography

(i) Cooperative Movement 1909 – 2006, Issue of the Pancyprian Cooperative Confederation Ltd, Nicosia 2006

(ii) Cooperative Movement, History – Education – Society, Issue of the Cooperative Central Bank Ltd, Nicosia 2008

c) English bibliography

i) The Cooperative Movement in Cyprus, Issue of the Authority for Supervision and Development of Cooperative Societies, Nicosia December 2004

4. The SCE Regulation and national Law on cooperatives

The Cooperative Movement in Cyprus has been offering services to the public for more than a century. With the enforcement of CSL (1985) some gaps and other weaknesses have been identified and therefore the law has been amended several times.

No specific amendments have been made to the CSL due to the enactment of the SCE Regulation.

The legal framework applicable to SCEs in Cyprus is satisfactory for their registration and operation. The Cooperative Societies Law does not contain any provisions which restrict any Cooperative Society to carry on activities in any sector of the economy, provided that they registered and obtain the necessary license under the relevant activity sector law.

The Co-operative Movement has been established in 1909 initially to face usury. The special legal framework that has been established and the real needs that existed on the island caused a rapid growth in the credit sector and subsequently to all other sectors.

The Cooperative Movement gradually became the most successful social institution established in our country and its operation has marked economic and social development for more than a century.

The people of Cyprus have consistently shown faith to the large socio economical role of the Cooperative Movement through the years, which has offered services to public to face difficulties, created positive effects to the society, contributed to the community, and overall improved the living conditions.

As previously mentioned in part 2, the main reason for not establishing an SCE in Cyprus is the local character of cooperatives and the absence of a need for cross border activities. It is also noted that within the period after the enactment of the SCE Regulation no new national cooperatives have been registered due to the reason that the Cooperative Movement is already well established in Cyprus after a century of operation. I believe that when cooperatives in Cyprus start engaging in cross border activities there will probably be new companies established by the cooperatives under the SCE Regulation.

Finally it should be stressed that the differences between the legal framework of local cooperatives in Cyprus and that of the SCEs are not so significant to result to the formation of local cooperatives instead of SCEs.

5. Visibility of the cooperative sector and other related issues

The Authority for the Supervision and Development of Cooperative Societies, an independent governmental authority, is responsible in creating a supportive environment for the development of cooperative societies in Cyprus. The Authority for the Supervision and Development of Cooperative Societies (ASDCS) was founded in 1935 and in cooperation with the other cooperative bodies and societies promotes a long-term policy of reorganization and modernization of Cooperative Movement. The amendment and modernization of the Cooperative Societies Law, the training and strengthening of the workforce of cooperative societies and the acquisition of modern technological means are some of the main aspects of the reorganization and modernization policy that followed.

(a) **Better Legislation and Regulation**

By the accession of the Republic of Cyprus to the EU, the Cooperative Societies Legislation has been fully harmonized with the EU Directives on credit institutions. Also a working group established by the ASDCS and the Cooperative Movement has an ongoing progress for the simplification, coding and modernization of the Cooperative Legislation. An external legal expert has been appointed to proceed with the drafting of the bill. The first draft of the bill has already been delivered to the ASDCS.

(b) **Education and Training**

The Cooperative Credit Institutions' (CCIs) personnel participate in a number of seminars with relevant subjects for the banking sector. These seminars are organised by the Pancyprian Cooperative Confederation in cooperation with the ASDCS. Moreover, a two year training program in "Business Administration and Economics" is provided to the personnel of the CCIs. The program is offered by the 'Centre of Continued Education, Assessment and Development' (affiliated of the University of Cyprus) and coordinated by the Pancyprian Cooperative Confederation in cooperation with the ASDCS. The aim of this training program is to help the personnel of the CCIs (especially the small CCIs) to enhance their knowledge and improve their skills. Currently 108 cooperative employees attended the course from September 2005

(c) **Cooperative Societies' Mergers**

Following the harmonization process with EU Directives and generally the accession of Cyprus to the EU, the Cooperative Movement has encouraged mergers of CCIs to create stronger and more competitive cooperatives. CCIs' mergers were successfully performed on a big scale and the number of CCIs has been reduced dramatically. Compared to 2005, by the end of 2009 the total number of CCIs was reduced from 361 to 112. Merged CCIs achieved critical mass and economies of scale, enjoy greater operational efficiency and are more capable of establishing a suitable organizational structure, broadening product range and risk diversification. To this end, CCIs' ability both to comply with imposed regulations as well as to deal with increased competition is significantly enhanced.

(d) **Central Body – Cooperative Central Bank**

As from 1.1.2008 the Cooperative Central Bank (CCB) has undertaken an additional role by becoming the Central Body of CCIs. CCIs became affiliated to the CCB by applying the relevant provisions of article 3 of the Directive 2006/48/EC regarding central body arrangements, whereby CCB guarantees their obligations and the affiliated CCIs' solvency and liquidity are monitored on a consolidated basis. The affiliated CCIs maintain their autonomy and independence as separate legal entities. CCB as Central Body is legally empowered, in cooperation with the Commissioner of the ASDCS, to issue instructions on concrete management issues, to obtain information from all affiliated CCIs and to monitor them as provided in the Cooperative Legislation and the relevant Regulative Decisions issued by ASDCS. Also, the CCB provides technical support, guidance and assistance as

regards to the financial and administrative policies and procedures of the affiliated CCIs, including support on internal audit, risk management and credit policy.

(e) **Fund for the Solidarity, Support and Development of Cooperative Credit Institutions**

Based on Cooperative Societies Law, the Cooperative Credit Sector set up a Solidarity Fund in order to support Cooperative Credit Institutions which may face financial difficulties with loans, grants and guarantees. All CCIs are obliged to become members of the Solidarity Fund. A Regulative Decision issued by the Committee of the ASDCS governs the operation of the Solidarity Fund which has been established since January 1, 2008. The Fund is governed by a 7 member Committee consisting of the Chairman- the ASDCS Commissioner, the Vice Chairman- the General Manager of the CCB and 5 other members (3 proposed by the Committee of the Pancyprian Cooperative Confederation and 2 by the Committee of the CCB) approved by the Commissioner.

(f) **Computerized System**

The project for the full computerisation of all CCIs is completed. All CCIs are now connected to a central server.

The prospects of the Cooperative Movement of Cyprus, after a century of operation, is to further enhance its socioeconomic role in the country, based on internationally accepted cooperative principles and always taking into consideration the needs of people of low and medium economic and social position.

CZECH REPUBLIC

By Zdeněk Čáp

SUMMARY. 1. The implementation of Regulation 1435/2003 in Czech legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A commentary on the implementation of the SCE Regulation in the Czech legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation,. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Czech legislation

1.1. Source, time and modes of implementation

In the Czech Republic, the Council Regulation (EC) No. 1435/2003 on the Statute for a European Cooperative Society (the "Regulation") as well as Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the Involvement of Employees (the "Directive") have been implemented by a single act, i.e. Act No. 307/2006 Coll., On European Cooperative Society (dated May 23, 2006) effective as of August 18, 2006 (i.e., as of the same day as both the Regulation and Directive). This act has been amended two times to date, by Act No. 126/2008 Coll., Amending Certain Acts in connection with Adoption of the Act on Transformations of Business Companies and Cooperatives (involving specification of certain provisions relating to a new legal regulation of transformation which was regulated by the Commercial Code in the past), and Act No. 227/2009 Coll., Amending Certain Acts in connection with Adoption of Act of Basic Registries (involving only a formal legislative regulation).

In connection with the adoption of Act No. 307/2006 Coll., on European Cooperative Society, also Act No. 308/2006 Coll., amending certain acts relating to adoption of Act European Cooperative Society has been adopted.

The Czech Republic has thus fulfilled the requirements laid down by Section 78 (1) of the Regulation.

1.2. Structure and main contents of the regulation

Act No. 307/2006 Coll., on European Cooperative Society (the "SCE") is divided into four parts. Part One thereof is broken down to nine chapters and provisions on the Regulation are contained in Sections 1 to 36. Part Two is broken down to six chapters and the provision regulating the involvement of employees of the SCE in decision-making of the SCE are contained in Articles 37 to 98 (relating to the Regulation). Articles 99 and 99a of Part Three contain transitional and delegating provisions. Part Four, Section 100 stipulates that this act stepped into legal force on August 18, 2006.

It is necessary to note that the Act on European Cooperative Society (the "SCE") states that the right to their own regulation granted to the Member States by different provisions of the Regulation has been used in many cases (as it follows from the subsequent text hereof). It is suitable to point out that (pursuant to Article 6, second sentence of the Regulation) the possibility to state that the head office must be the registered seat has not been used, as the Czech Republic keeps the unified regulation of the registered seat and head office (the Regulation use the term "Administrative Headquarters" instead of the term "Head Office") as this term is regulated generally for all the legal entities by Section 19c of the Civil Code (under the said provisions, a legal entity shall have its head office at the address of its registered seat; however, where a legal entity states as its seat a place other than its head office, everybody can also refer to its head office; however, a legal entity may not object that it has its head office at a different address with respect to a person who refers to the seat registered in a public registry).

As to the own wording of the Act, we can state that Part One, Chapter 1, Sections 1 and 2 contain initial provisions and Article 2 (pursuant to Article 2 (2) of the Regulation) reads that "A legal body the head office of which is outside of the territory of member states of the European Union or other states forming the European Economic Area (the 'Member State') may participate in the formation of an SCE provided that legal body is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy". Liberal access in this matter could be considered suitable because it follows from the national legislation that a membership in a cooperative is not limited – the respective European regulation is stricter. Concurrently, the application of Act ***116/1985 Coll***., on Conditions for Activities of Organizations with a Foreign Element in the Czechoslovak Socialistic Republic, as amended) has not been applied. This act fates from the period prior to the division of the Czechoslovak Federation, thus prior to formation of the independent Czech Republic (this act however is still relevant, and thus has not been abolished yet) – its wording however is incompatible with the requirements of the Regulation.

Part One, Chapter II, Sections 3 to 9 regulate the transfer of the registered seat of the SCE. Section 3 (in connection with Article 7 (2) of the Regulation) reads that "The statutory body of the SCE shall deposit a proposal for transfer of the registered seat in the

Collection of Deeds of the Commercial Register and publish it in the Commercial Gazette. The proposal for transfer of the registered seat may not be approved by the General Meeting prior to two months after publication thereof in the Commercial Gazette". In this respect, it is suitable to state that a "Commercial Register" is a public list wherein statutory particulars on entrepreneurs are registered by court; i.e. a court having local jurisdiction according to the seat of a specific legal entity registers such an entity (such a legal entity is incorporated only after its entry in the Commercial Register following its establishment), and other particulars relating to this legal entity – such particulars are enumerated by rules of law. A "Collection of Deeds" is a part of a file of each registered entity, and this entity is obligated to deposit deeds set forth by rules of law into such a Collection of Deeds. Particulars on entries in the Commercial Register are subsequently published in special periodically issued publication called "Commercial Gazette".

Significant in the light of consumer protection, Section 5 (1) reads (in connection with Article 7 (7) of the Regulation) that "If, as a result of the transfer of the registered seat, enforceability of claims has significantly worsened, the creditor of the SCE who submits his claims within three (3) months from the day when the transfer proposal has been published in the Commercial Gazette, has the right to request a sufficient security, unless otherwise agreed with the SCE".

Section 6 provides (pursuant to Article 78 (2) of the Regulation) that, in the Czech Republic, a notary shall be the authority competent to issue a certificate within the meaning of Article 7 (8) of the Regulation. It reads specifically that "The Notary issues a certificate within the meaning of Article 7 (8) of the Regulation based on submitted deeds". In this connection, Section 8 specifies requirements of such a certificate. Section 7 of the Act provides for a list of deeds to be submitted by an SCE to the notary for the purpose of issuing the said certificate. This provision states that the "SCE shall submit the following deeds to the notary:

a) transfer proposal;

b) a counterpart of a notarized record certifying a resolution of a General Meeting of the SCE approving a proposal for transfer of the registered seat;

c) deeds proving that the following has been published:

1. transfer proposal;

2. notification for members and creditors of their right to inspect the specified documents in the seat of the SCE;

d) report of the Board of Directors or Supervisory Board on reasons for transfer proposal;

e) declaration of all the members of the Board of Directors and Control Committee or Supervisory Board and Managing Director made in the form a notarized record to the extent that:

1. They are not aware of the fact that a proposal for declaring invalidity of a resolution of the General Meeting of the SCE or a lawsuit for determining invalidity of transfer of the

registered seat or that all proceedings of such a kind were effectively closed or that all the entitled persons waived such a right in a manner stipulated by a special law;

2. rights of all members and creditors determined by special rules of law have been satisfied or secured, or an agreement on another settlement of mutual relations has been concluded with such persons, or that they are not aware of the fact that somebody asserted any right against the SCE, and

3. Any and all particulars and information provided to members, creditors and notaries are complete and correct".

In connection with Article 7 (11) of the Regulation, Section 9 of the Act sets forth that announcements pursuant to Section 7 (11) of the Regulation is a basis for deletion of the original seat of the SCE from the Commercial Register, without the court issuing a decision on the merits.

Part One, Chapter III, Sections 10 to 13 provide for the registration of the SCE in the Commercial Register. Section 10 (1) (pursuant to Article 11 (1) firstly sets forth the duty of the SCE which has or shall have its registered office in the Czech Republic to be registered in the Commercial Register, and Section 10 (2) provides for a list of particulars to be registered in the Commercial Register and refers to special acts governing cooperatives. Section 11 (1) stipulates other particulars to be registered in the Commercial Register with respect to an SCE having a two-pier system (particulars stating that a member of the Control Committee temporarily performs the function of a Board member, date of establishment and termination of authorization to temporarily perform the function). Section 11 (2) states that "the particulars on the Board of Directors of a one-pier SCE shall not be registered; the following shall be registered instead:

a) name, surname and residence or commercial name, registered office and identification number of members of the Administrative Board;

b) name, surname and residence of the Managing Director;

c) name, surname and residence of the authorized director or directors;

d) date of establishment and termination of the function of the Administrative Board' Chairman

e) authorization of a member of the Administrative Board to perform the function of the Chairman of the Administrative Board and period of such authorization;

f) specification as whether the statutory body means the Chairman of the Administrative Board or the Managing Director who is note the Chairman of the Administrative Board;

g) manner in which the Administrative Board and statutory body act;

h) manner in which one or more authorized directors act".

In the event that a member of the Administrative Board is a legal entity, Section 11 (3) stipulates that also the name, surname and residence of the natural persons who will perform rights and duties of a member of the Administrative Board on behalf of the legal entity.

Section 12 provides for a list of deeds to be deposited by the SCE to the collection of deeds of the Commercial Register, except for deeds .set forth in the Regulation and deeds set forth for cooperatives by a special act.

In connection with Article 13 of the Regulation, Section 13 sets forth that a court maintaining the Commercial Register shall notify the Authority for Official Publications of the European Communities of each fact contained in Article 13 of the Regulation, within the timetable specified therein; the costs of such a notification made by the court shall be borne by the state.

Part One, Chapter IV, Section 14 provides (pursuant to Article 11 (4) of the Regulation) for certain provisions on a change to the statutes of the SCE. Section 14 (1) of the Act stipulates that “the provisions of the SCE’ statutes which are contrary to the agreement on manner and extent of the involvement of employees of the SCE concluded pursuant to this act shall be invalid”. Section 14 (2) of the Act states “the statutory body shall put the statutes in compliance with the agreement on manner and extent of the involvement of employees of the SCE without undue delay after the inconsistence of the statutes with the agreement on manner and extent of the involvement of employees of the SCE has been found out; the General Meeting shall not decided on this issue, however in its next meeting, members of the SCE however shall be informed about the extent and reasons for the changes made.

Part One, Chapter V, Section 15 to 19 of the Act provides for the establishment of the SCE through a merger. Section 15 of the Act reads (pursuant to Article 26 (2) of the Regulation) that “ Expert opinion shall be prepared under the terms and conditions stipulated by a special act for all the merging cooperatives jointly by two experts; the experts shall prepare a joint expert opinion on the merger in this connection. A joint expert opinion on the merger however shall not be permissible if so stipulated by the rules of law of member state where certain merging cooperative has its registered office”.

Section 16 of the Act provides (pursuant to Article 28 of the Regulation) for protection of those members who have opposed the merger. Section 16 (1) of the Act stipulates that “A member of the cooperative which participates in formation of an SCE by merger, and which has its registered seat in the Czech Republic, may terminate his membership in the cooperative within thirty (30) days of the day on which the general meeting of the cooperative approved the proposed project on establishing an SCE by merger, if he participated in such a general meeting and failed to vote for approval of such a proposal. A membership of the retiring member shall be terminated as of the date of delivery to the cooperative on termination of his membership. A notice of termination must be in writing and state the reason for such a termination. The termination of membership may not be recalled”. Section 16 (2) of the Act provides for the case where the merges was decided upon by an assembly of delegates as follows: “If the proposal according to Paragraph 1 has been decided upon by the assembly of delegates, a member who is not a delegate or who failed to vote for approval of the proposal as a delegate, terminate his membership in

the cooperative within ninety (90) days of the day on which the assembly of delegates approved the proposal according to Paragraph 1".

The issuance of a certificate pursuant to Article 29 (3) of the Regulation is governed by Section 17 of the Act. The Act authorizes a notary to issue this certificate and reads as follows:" The notary shall issue a certificate pursuant to Article 29 (3) of the Regulation based on submitted deeds. The certificate shall be a public deed". The requirements of such the certificate are stipulated in Section 17 (2) of the Act.

Section 18 stipulates a list of deeds to be submitted by merging cooperative to the notary. Certain additional provisions relating to certificate attesting to the completion of the acts and formalities to be accomplished for registration an SCE formed by merger in the Commercial Register, documents evidencing that the said requirements have been met, formalities of the certificate and a possibility for the notary to refuse to issue the certificates are set forth by Section 19 of the Act.

Part One, Chapter VI, Section 20 and 21 provides for a change of the cooperative's legal form to an SCE. Section 20 of the Act reads that "The Board of the Cooperative shall deposit the project for the conversion of cooperative into an SCE to the Collection of Deeds of the Commercial register and publish it in the Commercial Gazette with the time limit stipulated by Article 35 (4) of the Regulation." Section 21 of the Act states furthermore that "The Court shall appoint an expert to certify that conditions stipulated by Article 35 (5) of the Regulation have been respected by procedure stipulated by Act on transitions of Business Companies and Cooperatives while Transiting the Legal Personality of the Cooperative into a Joint Stock company".

The authorization contained in Article 35 (7) of the Regulation (i.e., Member States may make a conversion conditional on a favourable vote of a qualified majority or unanimity in the controlling organ of the cooperative to be converted within which employee participation is organised) has not been applied and this condition has not been implemented as the Czech rules of law do not recognize any such participation of employees in decision –making process in a cooperative (as opposed to a joint stock company) and there is no reason to implement it.

Part One, Chapter VII regulates internal structure of the SCE: chapter VII is furthermore divided into two divisions. Sections 22 to 24 of Division 1 govern a two-pier systems and states that the Czech legislation is fully sufficient in this respect. As the Regulation does not allow (except for two deviations) for any separate arrangement, the national legislation concerning an cooperative shall be applied pursuant to the subsidiary principle. Section 22 provides (pursuant to Article 37 (3) of the Regulation) that: "A member of the Control Committee who is temporarily authorized to perform the function of a member of the Board of Directors shall perform the function only until the next General Meeting of the European Cooperative Association to elect a new member of the Board of Directors; his authorization to perform the function shall cease to exist as of this date". Section 23 (according to Article 37 (2) of the Regulation) sets forth that "The statutes of the SCE may

provided that members of the Board of Directors shall be elected and removed by the General Meeting". Section 24 of the Act sets forth a minimum number of members of the Board of Directors and Control Committee of the SCE. Section 24 (1) of the Act (pursuant to Article 37 (4) of the Regulation) specifies that "The Board of Directors of an SCE which has its registered office in the Czech Republic shall have at least three (3) members".

Section 24 (2) of the Act (pursuant to Article 39 (4) of the Regulation) specifies that "The Control Committee of an SCE which has its registered office in the Czech Republic shall have at least three (3) members". With respect to the Control Committee, the authorization laid down in Article 40 (3) of the Regulation to expand the authorization to each member of the Control Committee vis-à-vis the Board of Directors has not been applied because the existing domestic legislation is sufficient.

Chapter VII, Division 2 which is divided into five divisions regulates (pursuant to Article 42 (4) of the Regulation) a one-tier system . The one-tier system concept has been taken over from the draft Commercial Code which has not been adopted yet. The one-tier system has been formed pursuant to a so called Swiss Administrative Board system which has been partially simplified for the purpose of inter-cooperative relations.

The provisions of Chapter 1, Sections 25 to 27 regulate the Administrative Board. Section 25 (1) reads (pursuant to Article 42 (2) that "the Administrative Board shall have at least three (3) members". The provisions of Section 25 (2) specify that "Members of the Administrative Board shall be elected and removed by the General Meeting". Section 25 (3) deals with the event where a member of the Administrative Board is a legal entity – in such a case, rights and duties arising from its membership in the Administrative Board shall be exercised by a natural person authorized to do so.

Section 26 provides for participation in a meeting of the Administrative Board and a possibility for one third of the members of the Administrative Board or the Managing Director to request convocation of the Administrative Board's meeting. The request must indicate the agenda of such a meeting which may not be reduced against the will of applicants. Section 27 regulates powers and duties of the Administrative Board, binding character of their resolutions, stipulating also that "where there is a discrepancy between resolutions of the General meeting and Administrative Board, the resolution of the General Meeting shall prevails; rights of third persons acquired in good will shall not be affected thereby".

Division 2, Section 28 provides for position and powers and duties of the Chairman of the Administrative Board and reads that "The Administrative Board may temporarily entrust its member to exercise the function of the Chairman, if the Chairman of the Administrative Board is temporarily disqualified to perform his function".

Division 3, Section 29 regulates the position and powers and duties of the Managing Director (pursuant to the Act on European Community). The Managing Director is the statutory body of a one-tier SCE. The Managing Director is authorized to act the director and manage the society's business. The provisions on Board of Directors of a

cooperative, or general provisions of a statutory body of a legal entity shall be applied with respect to the Managing Director mutatis mutandi, including terms and conditions for performing the function, capacity to perform the function, responsibilities and liability for a caused damage, remuneration and other rights and duties. The Chairman of the Administrative Board may be elected the Managing Director; however the company's procurator may not be elected the Managing Director.

Division 4, Section 30 provides for possibility of the Administrative Board to appoint, upon proposal of the Managing Director, one or more authorized directors, if not prohibited by the Statutes. It reads concurrently that the authorized director may not be a member of the Administrative Board, Managing Director or a procurator of the SCE. The Administrative Board shall determine the extent of powers and duties of the authorized director after a previous agreement with the Managing Director. Where more authorized directors are appointed, each of them shall be independently entitled to manage the cooperative's business and act on behalf of the SCE independently, to the same extent as the Managing Director, unless otherwise provided by the Statutes or a resolution of the Administrative Board.

Division 5, Sections 31 and 32 provide for joint provisions on bodies of a one-tier SCE. Section 31 of the Act provides that in case which are not governed by the Regulation or Act on SCE, the provisions on the Board of Directors and Control Committee of an cooperative which correspond, to the best possible extent, to nature and powers and duties of such bodies shall apply to the position of the Administrative Board, its members and Chairman, Managing Director and authorized director.

Part One, Chapter VIII, Sections 33 and 34 of the Act provides for winding-up of the SCE by the court. Section 33 (1) reads, (pursuant to Section 73 of the Regulation) that "Where the head office of an SCE which has its registered seat in the Czech Republic shall be, at variance with the provisions of Article 6, first sentence of the Regulation, transferred outside of the Czech Republic, the SCE shall without undue delay accept certain of the remedies stipulated by Article 73 (2) of the Regulation so that the head office is returned back to the Czech Republic". Section 33 (2) (pursuant to Article 73 (3) of the Regulation) provides that "Where a remedy is not effected within three (3) months from the day on which the provisions of Article 6, first sentence of the Regulation has been violated, the court may wind up the SCE even without an application, and order its liquidation. The SCE shall be terminated as at the effective day of the court's resolution".

Concurrently, Section 33 (2) (pursuant to Article 73 (3) of the Regulation) provides that "Prior to a resolution according to Paragraph 2, the court shall allow the SCE a time-limit for a remedy which may not be shorter than 90 days and longer than 150 days. Upon proposal of the SCE, this time-limit may be prolonged, however only once, and by sixty (60) days as a maximum. The provisions of Section 34 are connected to the provisions of 73 (5) of the Regulation and reads that "5. Where it is established on the initiative of a public body that an SCE has its registered office within the territory of another Member

State is located in the Czech Republic, that body shall immediately inform the Ministry of Justice which in turn shall without undue delay inform the respective body of the Member State in which the SCE's registered office is situated." This system has been used to simplify the entire process.

The provisions of Part One, Chapter IX ,Sections 35 and 36 of the Act provide for a change of a conversion of an SCE's legal form into an cooperative. In this case (in connection with Article 76 (4) and 76(5) of the Regulation), there is a duty to publish deeds relating to the draft terms of conversion, and the manner of appointing an independent court expert is determined. Section 35 provides for a duty of the SCE's statutory body to deposit the project of a conversion of legal form into the Collection of Deeds and publish it in the Commercial Gazette. The provisions of Section 36 provide that, for purpose of appraising the assets of SCE which is being converted into an cooperative, an independent expert shall be appointed by the court, in a procedure stipulated by a special act for appointing expert in case of a transition of the legal form of a cooperative.

Part two of the Act which is divided into six chapters regulates (in connection with the Regulation) the involvement of employees of an SCE.

Part two, Chapter 1, Section 37 to 42 lay down the initial provisions whereby the employees' right to be involved in decision-making on an SCE's issues under the terms and conditions set forth therein is declared and defied. Furthermore, these provisions regulate the right to be provided information, define a participating legal entity, pays attention to a subsidiary and controlling influence in such an entity, including definition of the said subsidiary and branch, and reads also that "By transiting the SCE's registered office to or from the Czech Republic, the extent of involvement of the SCE's employees shall not be diminished".

Part two, Chapter II is broken down to five divisions and deals with the involvement of an SCE's employees. Division I, Sections 43 to 51 regulate the rules for forming and composition of a special negotiating body, stets duties of the statutory body (or another managing body) of the participating legal entities, election of members of the Negotiating Committee and division of positions of the Negotiating Committee.

Division 2, Sections 52 to 55 regulates the rules of activities of and position in, the Negotiating Committee of employees, including duties of bodies of the participating legal entities in relation to the Negotiating Committee , possibilities of the Negotiating Committee to invite experts to its negotiations, right to remuneration for performing the function of a member of the Negotiating Committee, and prohibition of their discrimination in connection with performance of their function.

Division 3, Sections 56 to 60 regulate rules for adopting resolutions by and negotiations of the Negotiating Committee of employees. The Negotiating Committee may also decide, by a resolution adopted by a statutory majority of votes, that negotiations on the manner and extent of the involvement of employees of SCE shall not be opened, or that commenced negotiations on the manner and extent of the involvement of employees of

SCE shall be closed. The involvement of SCE's employees shall be restricted to the right to be provided information and negotiations to the extent set forth by legislation of that Member State where the SCE has employees, and the provisions of Act on Committee of Employees of the SCE shall not be applied (also, provisions o a special act on employees' access to supranational information and negotiation shall not be affected thereby). Also, a maximum period of time for negotiating the manner and extent of the involvement of SCE's employees and possibility to re-establish the Negotiating Committee, if at least ten percent (10%) of SCE'e employees or their deputies so request in writing.

Division 4, Sections 61 to 66 regulate the agreement on the involvement of SCE's employees. This agreement must be in writing and basic requirements thereof are determined.

Division 5, Sections 67 to 69 regulate procedure for the case when the agreement on the involvement of SCE's employees is not concluded.

Part two, Chapter III, Sections 70 to 72 regulate the involvement of employees in decision-making on issues of an SCE when SCE has been formed without a legal predecessor.

Part two, Chapter IV regulates the Employee Committee of an SCE and is broken down into five divisions. Division 1, Section 73 to 75 contains basic provisions relating to the right to information and negotiation, number of the Committee's members and their election.

Division 2, Sections 76 to 79 regulate the determination of members of the Employee Committee, stating that the Employee Committee's term shall be five (5) years from the date of election to the Employee Committee, and one member of the Employee Committee, shall be elected for each commenced 10% of employees of an SCE which are employed in the same Member State, calculated out of the aggregate number of employees of the SCE in all the Member States. Furthermore, it deals with the situation where number of employees increases or decreased during the term of the Employee Committee, including the Committee's duty to inform the Management Board or the Administrative Board and Managing Director on each change in the number of members of the Employee Committee, reasons for this change, and whose membership in the Employee Committee has been established or cancelled.

Division 3, Sections 80 to 85 regulates negotiations, powers and duties of the Employee Committee, including its duty to adopt Rules of Procedure and possibility to form a reduced Employee Committee consisting of no more than 3 (three) persons. Members of the Employee Committee are not entitles to a remuneration for performing their function, and any form of direct or indirect advantages, or direct or indirect discrimination of a member of the Employee Committee in connection with his function is prohibited. The SCE shall ensure the Employee Committee materially, financially and organizationally and shall ensure conditions for its activities.

Division 4, Sections 86 to 88 regulate the right to information. The SCE's Management Board or thee Administrative Board and Managing Director shall furnish to the Employee Committee a report of all activities of SCE and its other prospects. The report must include detailed particulars on the SCE's activities and position. The list of most important particulars is set by the Act. It states furthermore that "The SCE's Management Board of the Administrative Board and Managing Director shall provide the Employee Committee in advance with a proposed agenda of each meeting of the Management Board and Control Committee or the Administrative Board, copies of all documents submitted to the General Meeting, and inform it about decisions adopted by all bodies and the SCE, or provide copies of all minutes on such decisions". Also, the SCE's Management Board of the Administrative Board and Managing Director shall inform the Employee Committee without undue delay on all the facts which might adversely and in larger extent affect justified interests of the SCE's employees. The Employee Committee shall then continuously inform the SCE's employees.

Division 5, Section 89 and 90 regulate the right to negotiations and state that the SCE's Management Board of the Administrative Board and Managing Director shall discuss with the Employee Committee the report on all activities of SCE within reasonable time after its submission, comprehensively and considering especially justified interests of employees on keeping their jobs. Furthermore, Management Board of the Administrative Board and Managing Director shall, without undue delay, grant a request of the Employee Committee or, in urgent case, of the reduced Employee Committee, for convocation of a joint meeting for the purpose of providing information and discuss matters which might have a significant impact on employees; justified interests. Also those members of the Employee Committee who represent employees directly affected by proposed measure of the SCE shall be entitled to participate in meeting held upon request of the reduced Employee Committee and all concluded meetings of the reduced Employee Committee.

Part Two, Chapter V of the Act, Sections 91 to 96 regulate the right of influence of the SCE's employees in a manner and under the terms and conditions set forth in the SCE's Statutes in accordance with the Agreement on the Involvement (while complying with the statutory terms and conditions). The SCE's employees have the right of influence in the same extent as in a cooperative which was transferred in an SCE. If the SCE was formed otherwise than by transiting its legal form, the SCE's employees shall have the right of influence in such extent as was the largest extent of influence of employees of any participating legal entity, or to the extent which is the most favourable one of all the participating legal entities. The SCE' Employee Committee shall decide on posts in the SCE's Administrative Board or Control Committee that SCE's employees are entitled to held to be allocated to employees form the individual Member States, or on the manner in which the SCE' s employees to their representatives from the individual Member States shall elect or recommend for election members of the Administrative Board and Control Committee, or express their approval or disapproval with election of certain persons. The

resolution shall be adopted by the Employee Committee proportionate to the number of SCE's employees in the individual Member States to the aggregate number of SCE's employees in all the member states. Members of the SCE's Administrative Board or Control Committee elected by employees have the same rights and duties as members of the Administrative Board or Control Committee elected by the General Meeting.

Part Two, Chapter VI , Section 97 and 98 of the Act regulate common provisions relating the SCE's Employee Committee and also the right of influence of the SCE's employees and specifies that such provisions shall only be used if the Act on SCE or the Agreement on the Involvement so stipulate. It specifies further that if employees are entitled to influence the composition of the SCE's Administrative Board or Control Committee and unless otherwise stipulated by the Act on SCE or the SCE's Statutes adopted in accordance with the Agreement on the Involvement, the provisions of special act governing the election, removal, rights and duties of members of the Supervisory Board of a joint stock company elected by employees shall be applied mutatis mutandi to representation of employees in the Administrative Board or Control Committee, their election, removal and their rights and duties. A member of the Administrative Board or Control Committee elected by employees does t not have to be a member of an SCE.

Part Three of the Act contains transitional and delegating provisions and specifies (pursuant to Article 1 and 77 of the Regulation) the denomination capital of SCE after accession of the Czech Republic into the third phase of the European Economic and Monetary Union (the capital should be primarily denominated in terms of Czech crowns, but may also be denominated in EUROS) , and Section 99a specifies the authorization for the Ministry of Justice to determined, by means of implementation regulation, which deeds are to be submitted by a Czech participating cooperative to a notary to issue a certificate on legality of accomplishment of formation of an SCE by merger.

Part Four, Section 100 of the Act specifies that the Act shall enter into legal force on August 18, 2006 (in accordance with Article 80 of the Regulation).

On the whole, it is necessary to state that national cooperative legislation in the Czech Republic (which has basically not been modified by the Directive) has not involved participation of employees who are not members of a cooperative in decision-making of the SCE. This has not changed with respect to national cooperatives (even so, the cooperative' employees are not discriminated against other employees, as their rights are guaranteed by the Labour Code and other laws are not affected at all) and their participation has been provided for solely with respect to SCE. In this relation, the provisions of Section 37 (2) set forth that "The right of involvement in decision-making of SCE means such procedures according to this act whereby SCE employees may directly or indirectly influence decision-making of an SCE's bodies." Specifically, Section 37 (3) sets forth that "the right to involvement means:

a) entitlement to be provided information and negotiate;

b) entitlement to elect and be elected, appoint, recommend and agree and/or disagree with the election and/or appointment of the members of the board of directors or the auditing commission of a European Cooperative Society (i. e., the right of influence).

As it follows from the aforementioned, the aggregate legislation is based on this principle.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

Regarding designation of the competent authorities within the meaning of Articles 78 (2) of the Directive, it is necessary to state that this issue has been solved by the national legislation of the Czech Republic by implementing the individual relating articles of the Directive into Act No. 307/2006 Coll., On European Cooperative Society (as it also follows from the information referred to above relating to the individual provisions of the act).

Specifically, in relation to Article 7 of the Directive, Section 6 of the act sets forth that, in the Czech Republic, a notary shall be the authority competent to issue a certificate. Out of entities which were considered suitable to issue such certificates, this power has been vested in notaries, because they have the best qualification for this purpose (moreover, the same is stipulated by the Act on European Cooperative Society.

In connection with Article 21 of the Directive, it is necessary to state that a possibility given by this provision has not been applied in the Czech legislation, and thus no competent authority within the meaning of Articles 78 (2) of the Directive has been designated for this purpose.

The matter of designating authority authorized to issue a certificate attesting to the legality of a merger within the meaning of Article 29 of the Directive is solved by Section 17 of the act. The same solution as in case of certificate attesting legality of a change of registered office of SCE and this authorization granted to notaries.

In order to scrutinize the legality of establishment of SCE by merger within the meaning of Article 30 of the Directive, Section 19 of the act provide for the competence of a notary.

Given the fact that the Czech legislation fails to regulate a possibility to convene the members' meeting of a cooperative (or the general meeting, as the case may be) by any other body of competent authority outside if the cooperative (for example, by a state body or authority), no body nor competent authority has been designated within the meaning of Article 54 of the Directive.

In relation to Article 73 of the Directive (within the meaning of Article 78 (2) of the Directive), two competent authorities have been designed, that is a court and the Ministry of Justice of the Czech republic. Should a European Cooperative Society fail to remedy the situation within three (3) months from the day on which the provisions of Article 6 first sentence was violated, the court (the court maintaining the Commercial Register) may cancel it even without an application and order that it be wound up. Moreover, should any

public authority in the Czech republic find out that a breach of the Directive has occurred on the part of SCE, it is obligated to advise thereof the Ministry of Justice the Czech Republic. The Ministry of Justice shall in turn advise the state concerned about this fact.

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2. A comment on the implementation of the SCE Regulation in Czech legislation

In the Czech Republic, the implementation was carried out under the charge of the Ministry of Justice. According to persons preparing the draft of the act (as stated in explanatory report on this draft), the implementing of this Directive has been rather complicated, both with respect to the content and stylistics. Maximum stress was therefore put on precision and of the content and purpose of the act so as to comprehend and keep the purpose of the Directive. Concurrently, partial experience gained in implementing the Directive No. 2001/89 EC dated October 8, 2001 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

After drafting the act, in May 2005 inter-resort commentary proceedings were carried out where also the cooperative movement applied its comments. Subsequently, the draft act was introduced to the Government of the Czech Republic to be debated by the government which approved its introduction to the Chamber of Deputies of the Parliament of the Czech Republic, and the draft was introduced on October 26, 2005. Having been debated thoroughly, the draft was approved by the Chamber of Deputies of the Parliament of the Czech Republic on March 15, 2006 and, on March 17, 2006 the draft was submitted to the Senate of the Parliament of the Czech Republic. There it became complicated because on April 5, 2006, the Senate Legal and Constitutional Legislation Commission recommended that the draft be rejected on the grounds that many senators disapproved, according to their statement, to “a too large extent of the involvement of employees”, designating it as “strong socializing aspect”. Disappointingly, they failed to realize that they did approve such an involvement of employees in a case of the SCE. Eventually (in connection with other proposals raised by other senators), this draft was debated by the Senate of the Parliament of the Czech Republic, the amending proposal was modified and subsequently, on April 19, the draft act was returned to the Chamber of Deputies of the Parliament of the Czech Republic to finalize the legislation process as amended by the adopted amending proposal. The amending proposal requested that the entire part II of the draft dealing with the involvement of employees should have been deleted. As it was necessary to implement the Directive, the Chamber of Deputies of the Parliament of the Czech Republic insisted that the draft should be approved in the wording submitted by the Government of the Czech Republic. Subsequently, the Chamber of Deputies of the Parliament of the Czech Republic outvoted the Senate of the Parliament of the Czech Republic on May 23, 2006, and the draft was thus adopted (i.e., including the involvement of employees). On May 25, 2006, the president of the Czech Republic was advised to sign the draft, and he did so on June 1, 2006.

In spite of the aforementioned complications, the act was adopted in a timely fashion, and in the wording complying with the requirements laid down by the implementation. On the whole, it can be stated that the manner and extent of the implementation can be considered satisfactory, though the legislation seems to be too complicated in certain

issues (particularly in the light of the involvement of employees). This can be one of many reasons why this form has not been applied in the Czech Republic to date.

3. Overview of national cooperative law

3.1. Sources and legislation features

To comprehend the basic legislation framework for the Czech cooperative system, we deem it suitable to make a brief summary of its history. A long-term history of cooperative legislation governing cooperative in the current territory of Czech Republic reaches as far as to the second half of 19th century. This is when Act No. 70/1873 of the Imperial Code, On Communities for Assisting Trades and Economy (later on called "On Gainful and Economic Communities") which is deemed to be the first act on cooperatives in the Czech Republic had became effective in the former Austria-Hungary. Amended several times, (and together with later legal rules relating to cooperatives) this act had been effective in this territory until 1954 when it was abolished by Act No. 176/1954, On People's Cooperatives and Cooperative Organizations. Later on, Act No. 53/1954 was abolished by Act No. 109/1964 Coll., Economic Code. Cooperatives were exempted from the Economic Code in 1988 and governed by a separate Act No. 94/1988, On Housing, Consumption and Production Cooperative System which, after many years, became the first law separately governing legal relations of the non-agricultural cooperative system; it was soon replaced by Act No. 176/1990 Coll., which was later on replaced by the Commercial Code. The rules of law distinguished the individual types of cooperative according to their activities (housing, consumption, production, agricultural and other; also cooperatives providing services were included among production cooperatives and later on, also cooperatives dealing with computer technology were included among other cooperatives).

Agricultural Cooperatives had been regulated separately since 1949, by Act No. 69/1949 Coll., On Individual Agricultural Cooperatives which was replaced by Act No. 49/1959 Coll., On Individual Agricultural Cooperatives; this Act was abolished in 1975 by Act No. 122/1975 Coll. (amended by Act No. 111/1984 Coll.). Later on, this act was replaced by Act No. 90/1988 Coll., which however was shortly abolished by Act No. 162/1990 Coll., which in turn was replaced by the Commercial Code later on. Presently, the cooperative is regulated by the Commercial Code without distinguishing type of its activities.

The temporary system of national cooperative legislation of the Czech Republic can be comprehensively characterized to the extent that is vested in **Act No. 513/1991 Coll.**, the Commercial Code as amended.

A majority of requirements relating to position and activities of savings and credit cooperatives (Cooperative Savings Banks) is regulated by a special **Act No. 87/1995 Coll**., on Savings and Credit Cooperatives, as amended.

Certain requirements relating to housing cooperatives and membership in such cooperatives are governed by special provisions on lease of apartments of **Act No. 40/1964,** Civil Code, as amended. Another important rule of law influencing position of a housing cooperative though not all cooperatives, only those providing for transfer of apartments into the ownership of their members) is **Act No. 72/1994 Coll**., on Ownership of Apartments, as amended. This act stipulates particularly a manner of the cancellation of membership in a housing cooperative in transferring a cooperative apartment into the member's ownership, certain circumstances relating to settlement interest, as well as prohibition to transfer the cooperative apartment to the ownership of a person other than a member, if such a member is a natural person who is concurrently lessee of the cooperative apartment.

Act No. 378/2005 Coll., on Support for the Construction of Cooperative Apartments also relates only to certain cooperatives (those cooperatives which obtain or will obtain, based on an agreement concluded with the State Housing Development Fund, support to construct rental cooperative apartments). The Act sets forth special requirements relating to statutes, terms and conditions of a membership of a future interested party and economic activities of the housing cooperative, including dealing with its property.

In connection with the Council Regulation (EC) No. 1435/2003, On the Statute for a European Cooperative Society and the Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, **Act No. 307/2006 Coll.,** On European Cooperative Association was adopted in 2006.

In 2008 (effective as of July 1, 2008), fundamental changes relating to business companies and cooperatives were implemented. Legal regulation governing transition of both business companies and cooperatives (merger, division and change of legal form) was exempted from the Commercial Code by amendment made by Act No. 126/2008 Coll., on Changing Certain Acts relating to **Act No. 125/2008 Coll.**, on Transformations of Commercial Companies and Cooperatives.

Though only marginally at the present time, Act **No. 42/1992 Coll.**, Regulating Property Relations and Settlement of Property Claims in Cooperatives as amended (as so called Transformation Act or Act on Transformation of Cooperatives) deals with legal regulation of cooperatives. This act provided for a certain remedy of property relations between cooperatives created before January 1, 1992 and their members (that is, for most cooperatives which performed their activities prior to political and social changes in 1989).

3.2. Definition and aim of cooperatives

The definition and objection of a cooperative are contained in Section 221 (1) of the Commercial Code which sets forth that “Cooperative is an association of unrestricted number of persons united for the purpose of carrying out business activity or meeting the economic, social or other needs of its members.”

As there exist certain problems from a practical point of view, (in relation to additional rules of law), it has been necessary to lay down a definition of a housing cooperative. Reasons for a separate definition of “housing cooperative” are particularly vested in the provisions of Act on Ownership of Apartments (Act No. 72/1994 Coll.) relating to transfer of apartment units from the ownership of housing cooperatives into the ownership of their members, as well as in the provisions of Civil Code relating to lease of cooperative apartment and connected issues. The “housing apartment” is separately defined by the act in Section 221 (2) as “A cooperative which provides for the housing needs of its members is a housing cooperative.” This definition which in principle is based on the cooperative’ s subject matter was additionally included in the Commercial Code by an amendment implemented by Act No. 370/200 Coll., effective as of January 1, 2001, and particularly arises from judicial decisions of the Supreme Court. As failing to contain more specific definition of the contents or character of compliance with the housing needs, this definition however is not particularly apt. The said definition is to be understood to the extent that a housing cooperative is only such a cooperative whose main (or exclusive) purpose is meeting the housing needs of its members. Importance of this definition is particularly significant in case of disputes relating to membership in a housing cooperative and relating rights and obligations of its members, or their heirs, as well as rights and obligations connected with lease of a cooperative apartment (as legal relations arising from lease of a cooperative apartment are otherwise governed by numerous special provisions governing lease of an apartment in Civil Code). Otherwise, a separate definition of the terms “cooperative apartment” does not bring in a divergent legislation regarding its legal relations in the Commercial Code (as opposed to the general legislation relating to a cooperative), except for Section 230 – transfer of rights and obligations connected with a membership in a housing cooperative based on agreement (contract) where this transfer may not be restricted by bodies of the cooperatives in any manner whatsoever, and except for the provisions on transition of a housing cooperative (according to Section 178 of Act No. 125/2008 Coll., On Transitions of Business Companies and Cooperatives) setting forth that, in domestic merger of housing cooperatives, all the participating cooperatives, terminating and acquiring cooperatives must only be housing cooperatives. Cooperatives other than housing ones are not allowed to participate in such transactions.

A separate type of cooperatives is monetary cooperatives styled: “družstevní záložna,” credit union “Spořitelní a úvěrní družstvo,” or “spořitelní družstvo” or “úvěrní družstvo” (credit cooperative bank”). This cooperative is defined in Section 1 (2) Act No. 87/1995

Coll. which sets forth that “Credit union is a cooperative that, in order to support management of its members, performs financial activities which mean particularly receiving deposits and providing credit, guarantees and monetary services in different forms.” It therefore involves a cooperative formed for the purpose of carrying out business activities and meeting economic needs of its members; many significant variations from common regulation of a cooperative laid down in the Commercial Code are however set forth by the aforementioned law.

3.3. Activity

The Commercial Code considers each cooperative to be an entrepreneur (even though a cooperative does not pursue business activities, it is always registered in the Commercial Register); activities of cooperatives are however neither specified nor limited by the Commercial Code. The Commercial Code presumes that a cooperative can be formed for various purposes. As all other legal entities, a cooperative is entitled to perform business activities (or to pursue other activities) in all areas, provided that it has all the required permits. There exist certain exceptions where certain activities are allowed by another act only subject to certain terms and conditions, particularly if such an activity is allowed only for a certain form of a business entity. The most obvious case is bank which, according to the Act on Banks must have a legal form of a joint stock company (a credit union is an autonomous type of financial institution; credit union is a cooperative, however it must comply with numerous requirements typical for the banking sector). According to temporary legislation governing the insurance system, a cooperative could perform activities as an insurance company (however not as a reinsurance company). Certain regulation imposed on activities of cooperatives involves also the requirement set forth by the Act No. 378/2005 Coll., On Support for the Construction of Cooperative Apartments setting forth that statutes of a housing cooperative which is supposed to obtain support for construction of cooperative apartments from The State Housing Development Fund shall specify scope of activities and business activities only within the framework set forth by this act (the act thus distinguishes scope of the cooperative’s activities and its business activities). Specifically, Section 12 (1) sets forth that “Scope of activities of a housing cooperative which is receiving support may only be as follows:

a) bodyizing preparation and carrying out or ensuring the construction of cooperative apartments with support according to this act, construction of cooperative apartments other that those hereunder or other buildings to be owned by the housing cooperative, including relating acquisition of lands, structures or apartment buildings to be owned by the housing cooperative;

b) activities connected with lease of cooperative apartments built with support hereunder for members of such cooperative, furthermore lease of cooperative apartments

other that hereunder, non –residential premises or roof space, space on curtain wall or other similar space of an apartment house;

c) ensuring administration, operation, maintenance, repairs, restructuring, modernization and other alterations to structures owned by housing cooperative;

d) ensuring administration of other property owned by the housing cooperative;

e) providing and ensuring performances connected with the use of apartments and non-residential apartments in apartment houses owned by the housing cooperative and entering into relevant agreements to ensure such performances."

Additionally, Section 12 (2) sets forth that "Scope of business activities of a housing cooperative which is receiving support may only be administration of real estate and connected activities performed on the basis of an Agreement for Users of Units, Association of Owners of Users or Housing Cooperatives."

The scope of business activities of a credit union is absolutely specifically laid down by Section 3 of Act No. 378/1995 Coll. and is based on activities of cooperative in its position as a financial institution.

3.4. Forms and modes of setting up

Under Czech legislation, as it follows from Section 224 and 225 of the Commercial Code (governing establishment of a cooperative) and Section 225 of the Commercial Code (governing incorporation of a cooperative), establishment and incorporation (legal existence) of a cooperative consists of two phases.

Section 224 (1) of the Commercial Code sets forth that "A constituent meeting is required for the establishment of a cooperative." The act furthermore provides for competence of the constituent meeting, its course and role of a notary present in the constituent meeting; the holding of a constituent meeting is a mandatory condition for establishing a cooperative.. Specifically, Section 224 (2) sets forth that "The constituent meeting specifies the registered basic capital of a cooperative (i.e. that part of the basic capital which is entered in the Commercial Register, as opposed to business companies where the unchangeable registered capital is entered in the Commercial Register; the basic capital of a cooperative is changeable because a cooperative is "an association of unrestricted number of persons", "approves the statutes and elects members of the board of directors and auditing commission." Section 224 (3) provides that prior to deciding on the aforementioned issues. "The constituent meeting shall elect its chairman; until the chairman is elected, the meeting shall be presided by the person who convened such a meeting." Furthermore, the provisions of Section 224 (4) set forth that "The constituent meeting shall adopt resolutions by a majority of persons attending the meeting" and "an applicant for membership may withdraw his application immediately after voting on the statutes, if he voted against their adoption." According to the provisions of Section 224 (5)

of the Commercial Code, “constituent meeting results in the establishment of a cooperative, if the applicants for membership in the cooperative undertook obligation to make membership contributions amounting to the stipulated amount of the registered basic capital.” The basic membership or initial contribution shall be paid within fifteen (15) days from the day on which the constituent meeting was held to a determined member of the board of directors in a manner specified by the constituent meeting. Due to legal certainty, the provisions of Section 224 (6) of the Commercial Code provide that “Proceedings of the constituent meeting shall be certified by a notarized statement whose annex shall be a list of members attending the meeting and the amount of their individual membership contributions. A notarized statement shall be made on resolutions of the constituent meeting approving the statutes. This notarized statement shall also contain the approved wording of such statutes.”

There exists a certain practical problem to the extent that legislation governs the establishment of a cooperative only from a certain phase that is from the holding of a constituent meeting. Numerous activities however have to be pursued in preparing the constituent meeting. It is particularly necessary to agree upon fundamental requirements relating to the purpose of the future cooperative (purpose for which it is to be established, scope of activities or business activities etc.). Also it is necessary to prepare draft statutes to be submitted to the constituent meeting for its approval, election of the cooperative’s bodies and other requirements relating to the bodyization of the constituent meeting. Though it is obviously impossible for the law to specify details for the preparation of the constituent meeting, it would be suitable to specify this proceeding at least generally, within this provision (for example by stipulating requirements for holding the cooperative’s constituent meeting). The cooperative is actually the only legal entity governed by the Commercial Code which is established only by its constituent meeting, i.e. without agreeing on Memorandum of Association, or executing a Founding Deed (which would however not be applicable for a cooperative, as it is impossible for a cooperative to be established by a sole person). This is not influenced by the fact that the statutes of a cooperative are identified to be a certain type of a Memorandum of Association. A cooperative may not be established only by adopting the statutes (adoption of the Statutes is only one requirement necessary for establishment of a cooperative in its constituent meeting). Certain additional conditions are explicitly set forth for establishment of a Credit union by Act on Credit Union. Particularly, it is necessary to obtain a permit of the Czech National Bank for establishment and activities of a credit union; however, a “capital” amounting to at least 35 million Czech Crowns shall be paid prior to filing an application for this permit.

According to Section 225 (1) of the Commercial Code, “A cooperative shall be incorporated as of the day on which it is entered in the Commercial Code.” Prior to filing an application for such an entry, at least half of the registered basic capital must be paid. The provisions of Section 225 (2) provide that “The application for entry in the Commercial

Register shall be submitted by the board of directors." The application shall be signed by all the members of the board of directors. According to Section 225 (3) of the Commercial Code, a counterpart of a notarized statement on resolution of the constituent meeting and a counterpart of a notarized statement on resolution of the constituent meeting of the cooperative approving the statutes of the cooperative, statutes of the cooperative and a document evidencing the payment of the specified amount of the registered basic capital shall be attached to the application for the entry in the Commercial Register."

3.5. Membership

Basic legislation of membership in a cooperative is laid down in Section 227 et al. of the Commercial Code. These provisions govern both persons who are eligible for membership in a cooperative, and the individual manners of the establishment and cancellation of membership in a cooperative, including terms and conditions of transfer of rights and duties of a member.

According to Section 227 (1) of the Commercial Code, "Both natural persons and legal entities may become members of a cooperative. The statutes may specify that membership in the cooperative must be connected with employment in the cooperative, in which case only an individual (natural person) who has finished compulsory school attendance and has reached 15 years of age may become a member of the cooperative." The provisions of Section 227 (2) specify the manners in which membership is established, setting forth that "Membership in a cooperative commences (i.e. is established) on fulfilment of the conditions ensuing from law and the statutes

a) upon establishment of the cooperative, as of the day of formal incorporation of the cooperative;

b) during the existence of the cooperative, based on written application for membership in the cooperative;

c) transfer of membership or

d) any other manner set forth by law".

At the present time, another manner of establishment of membership in a cooperative is laid down, inter alia, by the provisions of Section 232 (4), where a legal successor of a legal entity assumes all the rights and duties of former member. Another case of establishment of a membership by law occurs when members of a cooperative dissolved by a merger become members of the acquiring cooperative (Section 244 (2) of Act No. 125/2008, On Transformation of Commercial Companies and Cooperatives), or when members of a divided cooperative become members of the acquiring cooperative (Section 64 (2) of Act No. 125/2008, On Transformation of Commercial Companies and Cooperatives).

Furthermore, the provisions of the Civil Code relating to the lease of a cooperative apartment shall be applied similarly to membership in a housing cooperative connected with lease of a cooperative apartment. This involves specifically transfer of a natural persons' membership in case if inheritance pursuant to Section 706 (3) and 707 (2), sentence third and fourth of the Civil Code.

As regards membership in a housing cooperative which receives support to built cooperative apartments according to Act No. 378/2005 Coll., the statutes must regulate also certain requirements for membership according to Act on Support for the Construction of Cooperative Apartments. Specifically, provisions Section 10 (1) thereof set forth that "Only a natural person of legal age if he agreed to pay an additional membership contribution determined by the statutes amounting at least to 20% of the costs for acquisition of a cooperative apartment whose lessee such a person is to be, for the purpose of financing construction of cooperative apartments with support hereunder, shall be eligible for membership of a cooperative receiving support; the member does not have to be of legal age if his membership was established by transfer of membership rights and obligations by the inheritance": A legal entity, however only another housing cooperative, may become a member thereof only if the other housing cooperative agrees to perform activities for the cooperative whose member it shall become specifically laid down by act on support of construction of cooperative apartment, specifically if it agrees to ensure, based on approval of a meeting of members the following:

a) requirements connected with establishment and incorporation of a housing cooperative receiving support,

or

b) activities connected with reparation and bodyization of construction of apartments with support hereunder, or activities connected with administration of real estate owned by the housing cooperative which is receiving support, and also other requirements within the scope of activities of a housing cooperative which is receiving support.

Also, special provisions of Act on Credit unions shall be used for membership in a credit union. For this case, the special act sets forth in Section 2 (1) that "A credit union shall have at least thirty (30) members." According to the original wording of the Act on Credit unions, only a natural person was eligible for membership in a credit union. This restriction was abolished later on (in 2004) and at the present time, both natural person and legal entities may become members of the credit union. On top of this, a special group of members has been introduced into a credit union, "members with qualified participation." i.e. those whose participation in the registered capital or voting rights of a credit union amounts to at least 10%, or those who can significantly influence management of the credit union.

Membership in certain cooperatives is subject to performing work for the cooperative. Section 227 (3) of the Commercial Code sets forth that: "Where the statutes require that an employment relationship is a condition of membership in the cooperative, and unless

anything else ensues from the statutes, membership commences on the day which is agreed as the first day of employment, and terminates on the day when the employment relationship comes to an end."

A significant condition for establishment of membership is payment of the basic membership contribution. The statutes may state that a payment of a specifically determined part of the basic membership contribution styled initial payment suffices for establishment of membership. Membership cannot be established prior to payment of this initial membership, as the provisions of Section 227 (4) stipulate that "Membership cannot be established prior to payment of an initial contribution."

Legislation regarding of membership is specified by law generally; the provisions of Section 227 (5) of the Commercial Code provide that "Detailed regulation of membership, its establishment and termination is regulated by the statutes."

According to Section 229 (1) of the Commercial Code, at the time of duration of a cooperative, "A member may transfer his rights and duties to another member of the cooperative, unless this is ruled out by the statutes. An agreement on transfer of membership rights and duties to another person is subject to approval by the board of directors. The statutes may lay down the grounds for precluding such a transfer; a member may appeal to the members' meeting in the event of a negative decision by the board of directors. On approval by the board of directors or members' meeting, an applicant becomes a member of the cooperative with the same rights and duties as the member from whom these rights and duties were transferred."

Concurrently, Section 229 (2) of the Commercial Code stipulates that: "The statutes may provide for circumstances in which the board of directors may not withhold its approval of the transfer of membership rights and duties, or in which approval by the board of directors is not required."

Separate legislation relates to a housing cooperative. The provisions of Section 230 of the Commercial Code provide that "The transfer of rights and duties connected with membership in a housing cooperative, if such transfer is based on an agreement (a contract), is not subject to approval by the cooperative's bodies. The rights and duties arising from membership are transferred to the transferee (i.e. the person acquiring membership) when a contract on transfer of membership is presented to the cooperative concerned, or at a later date specified in the contract. Consequences identical to those following from presentation of a contract on transfer of membership take effect when a cooperative is notified in writing of transfer of membership by the transferor and when it receives the transferee's written consent to his membership."

Effective as of August 1, 2009, credit union has been regulated separately. Until that time, transfer and devolution of membership right and duties were not admissible (according to a special act).

At the present time, Section 4 (2) of the Act on Credit Unions sets forth that: "membership rights and duties (hereinafter, the "membership rights") shall pass to legal

successor of a member who died or ceased to exist. Membership of legal successor by passage of membership rights shall not be established if legal successor is not a person eligible for membership in a credit union." Furthermore, the provisions of Section 4 (3) set forth that "Division of membership rights of a member who died or ceased to exist is not admissible in passing to legal successor." According to the provisions of Section 4 (4) of the Act, a member of the credit union shall "be entitled to transfer membership rights to another person. If only membership rights from additional membership contributions are involved in such a transfer, such rights may be transferred only to the credit union's member. An agreement on transfer of membership rights to an acquirer is subject to approval of the board of directors of the credit union. Unless a later date is stated in the agreement on transfer of membership rights, the acquirer obtains the transferred membership rights by resolution of the board of directors on approving the agreement on transfer of membership rights. If transfer of membership rights is subject to a prior approval of the Czech National Bank, the acquirer may not obtain the transferred membership rights until the day on which the approval of the Czech National Bank is granted." The said approval is required provided that the acquiring member would obtain a qualified participation in the credit union or would increase his qualified participation in such a manner that he would reach limits specified by law.

The individual reasons for termination of membership in a cooperative are specified by the provisions of Section 231 (1) of the Commercial Code which read that: "Membership is terminated by a written agreement, on withdrawal of one's membership, expulsion, adjudication of a bankruptcy order against a certain member's property, dismissal of a bankruptcy order due to such member's lack of assets (property), and final ruling imposing an order to levy execution to seize a member's rights and duties in the cooperative, a writ of execution to seize a member's rights and duties in the cooperative (issued under a final ruling) or on dissolution of the cooperative."

It can be added to termination of membership in a cooperative by declaring bankruptcy with respect to the member's property that, according to Section 206 (1) clause j) of the Insolvency Act, also the rights and other property values valuable in money belong to the property estate in the Czech Republic (thus, they belong to property determined to be sued to satisfy the debtor's creditors) and, according to Section 228 clause d) of the insolvency act, also the exercise of membership rights and duties of a cooperative's member is deemed to be the dealing with the estate. The membership is terminated *ex lege* because of the day on which bankruptcy is declared. The cooperative is not informed of this fact (it is only possible to verify it in the bankrupt's register), however a member as debtor is informed thereof, as documents are delivered to his own hands according to Section 138 (1) of the Insolvency Act.

Should a membership in a cooperative be terminated on the grounds of a rejection of insolvency proposal due to lack of the member's property, the insolvency court shall reject the insolvency proposal due to lack of property if it follows from the list of the debtor's

property and investigation made by the insolvency court that the debtor's property shall not be sufficient to cover the costs of insolvency proceedings and, should the debtor's creditors have been invited by a notice to communicate data on the debtor's property and his legal acts over which invalidity or ineffectiveness could be declared, and no debtor's property nor his acts were discovered.

Should the membership be cancelled due to an order to exercise decision according to Section 320 (1) of the Civil Procedure Code, the exercise of this decision effects a claim of the liable member arising from his right to the settlement share, or from the right to liquidation remainder, if the cooperative has adjudicated liquidation at the time that when the exercise of the decision has been ordered. This applies also to the case of issuance of an execution order to effect membership rights and duties after legal effectiveness of a resolution to order execution.

Furthermore, the provisions of Section 231 (2) of the Commercial Code set forth that "If a bankruptcy order on a certain member's property is cancelled due to reasons other than discharge of the resolution to distribute the estate or a lack of assets (Note 1), his membership shall be renewed; if the cooperative has paid a settlement share to such member, he must refund it to the cooperative within two months of the day when the bankruptcy order was cancelled. The same shall apply if an order to levy execution or a writ of execution against a member's rights and duties in the cooperative is stayed by a final ruling (judgment) under other statutory provisions."

If membership is cancelled due to member's cancellation of his membership, the provisions of Section 231 (3) set forth that "In the case of membership withdrawal, membership terminates within a period laid down in the statutes, but no later than six months after the day when a member notified the managing board in writing of his withdrawal."

Furthermore, Section 231 (4) of the Commercial Code provides that "A member may be expelled if, despite of warning, he repeatedly breaches his member's duties, or for other serious reasons laid down in the statutes. An individual may also be expelled if under a final judgment he is sentenced for a deliberate criminal act against the cooperative or one of its members. Unless the statutes specify otherwise, it is the board of directors which decides on the expulsion of such a member and communicates its decision in writing to him. The expelled member may appeal to the members' meeting against the decision to expel him. Should the right of appeal not be asserted within three months of the day when the member learned or could have learned of the decision to expel him, such right shall expire."

Concurrently, the Commercial Code provides in Section 231 (5) for court protection of the expelled member to the extent that "The court, acting upon a petition from the member to whom the decision relates, shall rule on the matter; if the resolution of the members' meeting contradicts statutory provisions or the statutes, the court shall nullify the resolution. The right to file a petition with the competent court shall extinguish if such

petition is not filled within three months of the members' meeting which confirmed the member's expulsion, or if the members' meeting was not duly convened as of the day when the member could have learned of the holding of the members' meeting which confirmed his expulsion, but no later than one year after the day when the members' meeting was held."

In Section 231 paragraph 6, the Commercial Code foresees situation where a petition for invalidating a resolution of the member's meeting on expulsion of a member due to a challenge whether or not such a resolution was adopted. This may happen either through a proposal to the extent that the alleged resolution was not adopted by the member's meeting since it did not vote on it, or through a proposal to the extent that the content of the alleged resolution does not conform to the resolution which was adopted by the member's meeting. Also in this case the petition may be filed with the court within three (3) months from the day on which the member has learned of the alleged resolution. An objective period of one (1) year from the day on which the member's meeting was held has been however determined in this case as well. Should there exist doubts as to the actual holding of the member's meeting which should have adopted the resolution confirming the expulsion of a member while discussing his appeal, the period for filing the petition with court shall commence as of the day of the alleged holding of such a meeting. Unless the petition is filed within the prescribed period of time, the right to file the proposal shall extinguish, and the alleged resolution of the member's meeting on expulsion shall be final and effective. Furthermore, in both the mentioned cases, subject-matter of the petition is not conflict of the resolution of the member's meeting with the rules of law or statutes, as provided in Section 5, but the fact that the alleged resolution has not been adopted at all, or that the alleged resolution stated in minutes fails to correspond to the resolution which was actually adopted by voting in the member's meeting.

Section 232 of the Commercial Code deals with termination of a member who is a natural person upon his death, along with the heirs' possibility to apply for membership in the cooperative and connected requirements, and furthermore termination of membership or legal succession in case of winding up of a member who is a legal entity. The provisions of Section 232 (1) to 232 (3) relate only to a natural person, specifically termination of the natural person's membership upon his death and connected requirements. Though this provision relates to manners of the cancellation stipulated in Section 231, it is concurrently a special manner in the light of legal facts on which the termination or devolution of membership is based. On the one hand, a member's heir is entitled (not obligated) to apply for membership, and, on the other hand, the cooperative is only entitled (not obligated) to grant this application; due to this reason, it is set forth that the law or statutes may determine such cases where the cooperative may not refuse the heir's membership. Particularly, only the board of directors can decide this matter by law. Furthermore, also cases where the board of directors' approval is not requested for acquisition of membership rights and duties might be specified by the statutes or by virtue of law.

Disregarding whether or not such a case is involved where the board of directors may not refuse the heir's membership, or a case where the Board of Director's approval is not requested for acquisition by heir of membership rights and duties, membership shall be established only on the basis of an express declaration of the heir's will to become a member of the cooperative (i.e., based on his application).

Membership of an heir in a housing cooperative is governed somewhat differently. Section 232 (2) of the Commercial Code provides that "Approval of the board of directors is not required in an heir acquired rights and duties connected with membership in a housing cooperative." We can state that the terms used by the Commercial Code and Civil Code as regards a housing cooperative are not unified; the Commercial Code mentions devolution of rights and duties connected with membership in a housing cooperative, whereas the Civil Code mentions devolution of membership for the benefit of an heir who acquired membership interest. Certainly, devolution of membership absolutely means devolution of "rights and duties connected with membership in a housing cooperative" according to Section 232 (2) of the Commercial Code; moreover, also passage of the lease of an apartment is expressly referred to. It can be concluded that the Civil Code sets forth both passage of membership, and passage of the lease of a cooperative apartment because it does not expressly follow from the provisions of the Commercial Code that the right to lease a cooperative apartment is a part of the rights and duties connected with membership in a housing cooperative (such a regulation may however be contained in the statutes of the housing cooperative).

Furthermore, the provisions of Section 232 (3) of the Commercial Code set forth that "An heir who did not become a member of the cooperative has the right to a settlement share of the member whose membership terminated."

Separate regulation for a member who is a legal entity is contained in Section (4) of the Commercial Code, which sets forth that "The membership of an entity in a cooperative terminates when such entity goes into liquidation, or if it is under a bankruptcy order or on its dissolution. Where an entity has a legal successor, the latter assumes all the rights and duties of the former member."

3.6. Financial profiles

A cooperative is a legal entity which is obligated by law to create basic capital and have it entered in the Commercial Register; however, the cooperative does not enter the aggregate amount of its basic capital in the Commercial Code, but its value determined by the statutes (usually lower that the aggregate value of the basic capital) called by the act as "registered basic capital." The reason is both an open membership, and thus variable number of members during the existence of the cooperative, and related variable amount of the basic capital. The provisions thus distinguish between "the basic capital" and

"registered basic capital" and set forth the minimum amount of the capital to be entered in the Commercial Register (i.e., the minimum amount of the registered basic capital). A special legal term for the registered basic capital has thus been introduced for a cooperative which is not known in legislation governing business companies, or legislation governing other legal entities.

Specifically, the provisions of Section 223 (1) of the Commercial Code provide that "Registered capital of a cooperative consists of all the membership contributions that the members agreed to pay." The law does not specify type of membership contributions; the basic capital does not include only basic membership contributions, but also other membership contributions, if allowed by the statutes. Furthermore, Section 223 (2) of the Commercial Code provides that "The statutes (in Czech "stanovy") shall specify the amount of registered capital to be entered in the Commercial Register ("registered basic capital", also referred to as "recorded basic capital"; in Czech "zapisovaný základní kapitál"). The amount of registered basic capital may not be less than CZK 50,000."

The provisions of Section 223 (3) specify the basis of a member's property participation in a cooperative as follows "Membership is conditional on payment of a membership contribution as determined by the statutes (referred to as a "basic membership contribution"; in Czech "základní členský vklad"), or payment of a certain part of the basic membership contribution laid down in the statutes (referred to as an "initial membership contribution"; in Czech "vstupní vklad")."

Furthermore, subject to the provisions of Section 223 (4) of the Commercial Code, "If the statutes so admit, members of the cooperative may undertake to pay additional contributions in order to increase their capital interest in the cooperative under the conditions set out in the statutes."

As the amount of the initial membership contribution is not determined by law, it only depends on the cooperative which amount shall be laid down by the statutes. If the statutes do not admit additional membership contributions, the basic capital shall be formed only by initial membership contributions. If the cooperative is concurrently established only by a minimum number of natural persons, i.e. by five (5) members, initial membership contributions of each of them shall amount to at least CZK 10,000 (then the amount of the registered capital and the registered basic capital would be identical; this is admissible as the number of members may not be lower than the statutory minimum number). The basic capital however may be for example CZK 100,000 or more. In such a case, it might be difficult for certain members to pay the initial membership contribution in one payment, and they could not become members until payment of the membership contribution. This is why an initial contribution has been determined by law as a part of the basic membership contribution which has to be paid so the membership could be established. The initial contribution may however be applied to a specific cooperative only if the cooperative's statutes so provide, concurrently setting forth its amount. This amount should thus allow for at least one half of the registered basic capital to be paid prior to

registration of the cooperative in the Commercial Register. The entire amount of the basic membership contribution as determined by the statutes (i.e., difference between the amount of the initial contribution and basic membership contribution) must be paid within three (3) years, unless a shorter period of time is determined by the statutes according to Section 223 (6). This provision concurrently sets forth that "A member must pay up his membership contribution over and above his initial membership contribution, within three years, unless the statutes provide for otherwise. The statutes may also specify that the cooperative's members must pay the unpaid amounts of their contributions prior to their maturity, if the members' meeting decides (passes a resolution) that it is necessary because of a loss suffered by the cooperative."

The provisions of Section 223 (5) of the Commercial Code also admit in- kind contributions as follows "Nonmonetary contributions are appraised in the manner laid down in the statutes, or as agreed by all the members (applicants) on the formation (founding) of the cooperative."

The registered basic capital of credit unions is governed in a special manner. According to Section 2 (2) of the Act on Credit unions, the minimum registered basic capital amounts to CZK 500,000. Concurrently, to acquire permit for credit union's activities, according to Section 2 (3) of the Act on Credit union, an amount of at least CZK 35 000 000 has to be paid; this amount consists of basic capital, or the risk fund and reserve fund, if such funds were created upon establishment of the credit union.

The manner of property settlement upon termination of membership is generally governed by Section 233 and 234 of the Commercial Code. The provisions of Section 233 (1) set forth that "Where membership terminates during the existence of the cooperative, the member has the right to receive a settlement share." According to Section 233 (2) of the Commercial Code, "A member's settlement share is determined on the basis of the ratio of his paid-up membership contribution, multiplied by the number of his completed years of membership in the cooperative, to the sum of all members' paid-up membership contributions, multiplied by the number of their completed years of membership." The law determines the basis for calculating the settlement share in Section 233 (3) as follows: "The equity capital of the cooperative according to the financial statements for the year in which the membership of a particular person terminated shall be decisive for computing a settlement share. When computing a settlement share, resources in the indivisible fund shall not be taken into account and, if the statutes so specify, resources in other secure (reserve) funds shall also not be included in such computation. Contributions made by members whose membership was of less than one year's duration prior to the day at which the ordinary financial statements are drawn up shall not be taken into account." The due date for payment of the settlement share is laid down in the provisions of Section 233 (4): "A settlement share is payable within three (3) months after approval of the financial statements for the year in which membership was terminated. An entitlement to a share in

profit exists only for the period during which the person concerned was a member of the cooperative."

The manner of calculating the settlement share is stipulated by law in a supportive way, as this involves directory provisions according to Section 233 (5). Thus the statutes of a cooperative can choose the specific manner of calculating the settlement share accordingly to the specific situation of the cooperative. It thus depends only on the cooperative's decisions whether or not the manner laid down by law will be used (by reference to this provisions or its inclusion in the cooperative's statutes), or if the cooperative shall use its own manner of calculating the settlement share.

Furthermore, the provisions of Section 234 (1) of the Commercial Code stipulate that "A settlement share is paid out in cash. The statutes may specify that, if the membership contribution to the cooperative consisted partly or wholly of a transfer of title to real estate from the member to the cooperative, the member may ask for the return of the real estate in the value recorded in the books of the cooperative at the time of termination of his membership. If his settlement share is less than the value of the returned real estate, the acquiring member must pay the difference to the cooperative in cash. The statutes may lay down that a similar procedure shall apply when the membership contribution was provided in kind (other than real estate). The cooperative is accountable to the member if it manages the cooperative property in a manner which would render such return impossible."

The provisions of Section 234 (2) of the Commercial Code stipulate further that: "The entitlement [pursuant to subsection (1) above] to the return of agricultural land contributed to the cooperative pertains to the member even if the statutes do not specify an entitlement of this kind."

At any time, the settlement share of a cooperative upon termination of membership during the existence of the cooperative must be distinguished from a possibility, if any, to return additional membership contribution (or its part) or to return additional property participation (or its part) during the membership, the statutes so explicitly specify. Legislation governing of the said property participations in a cooperative laid down by the Commercial Code does not exclude that possibility to return this property participation could be regulated by the cooperative's statutes (as opposed to the basic membership contribution which cannot be returned during the existence of membership and which might only be decreased by amending the statutes), it being understood that the additional membership contribution (or additional property participation in the cooperative's business activities) would not have to exist during the entire existence of membership. If the statutes admit that such forms of a member's property participation (or their parts) in the cooperative could be returned during the existence of membership (which is actually admitted by the statutes of many cooperatives), these facts must then be sufficiently regulated, for example along with the procedure for filing application by a member for return of his additional membership contribution (or its part) or his additional property

participation in the cooperative's business activities (or is part) during membership in the cooperative. It follows from the aforementioned that, should the statutes provide for the possibility for a member to be paid back additional membership contribution (or its part) or additional property participation in the cooperative's business activities (or is part) upon his request, it does not mean settlement according to Section 233 of the Commercial Code and neither this provision nor provisions of the statutes governing the settlement share shall be applied; this only involves a decrease of the aggregate amount of the member's property participation in the cooperative exclusively subject to the respective provisions of the cooperative's statutes. Provided that this possibility is not regulated by the cooperative's statutes, the cooperative's member is not entitled to be paid back additional membership contribution (or its part) or additional property participation in the cooperative's business activities (or is part) during the cooperative' existence. Possibility back to be paid back additional membership contribution (or its part) cannot be admitted by statutes of a housing cooperative provided that the member participates thereby in acquisition of an cooperative apartment (or a house with cooperative apartments), no matter if the cooperative constructs such apartments or purchases them.

As a majority of provisions of the Commercial Code on settlement share (as mentioned above) are directory rules, numerous cooperative actually use the possibility to arrange their statutes in their own way. It is necessary to point out that is not possible to determine an inadequately long period of time for the maturity of the settlement share, as such a provision would be contrary to "good manners" according to the Civil Code. In connection with court decisions, it is to be pointed out that seven (7) or ten (10) year period was deemed to be an inadequate period of time payment of the settlement share.

The time limit for payment of the settlement share in a housing cooperative is specifically governed by the provisions of Section 714 of the Civil Code in case of termination of membership connected with extinguished lease of a cooperative apartment. According to this provision, a member may seek return of his membership share only after he has vacated the cooperative apartment. The time limit is determined by the cooperative's statutes and commences on the day following the day on which the former member has vacated the cooperative apartment. Should the statutes fail to determine the time limit for payment, the settlement share would be payable upon request after the cooperative apartment has been vacated. Furthermore, Section 25 of Act on Ownership of Apartments contains a special provision providing for a manner of the settlement share different from the provisions of Section 234 (1) of the Commercial Code. Specifically, the provisions of Section 25 of the Act no Ownership of Apartment admit that a housing cooperative and its former member (whose membership terminated upon transfer of the housing unit to his ownership) can agree that the settlement share will not be paid in money; for example, the owner of the unit – former member of the cooperative may be able to acquire another property from the cooperative equal to the value of his settlement share.

The Act on Credit unions regulates the settlement share separately. The provisions of Section 4c of the Act on Credit unions set forth that its calculation is similar to that governed by the provisions of Section 232 (2) and 232 (3) of the Commercial Code. The only difference is that in case of credit unions this is a mandatory legislation.

A highly significant institute and exclusive and extremely specific matter in cooperative legislation an indivisible fund; it is an institute which does not exist in other legal entities in the Czech legislation. In practical matters of a cooperative or in expert discussions, the nature and of the reserve fund of a business company and related legislation are sometimes compared with the indivisible fund of a cooperative; though there is certain similarity, it is impossible to disregard differences, particularly those concerning the purpose and manner of authorized use of the said funds. The indivisible fund is often identified as one of the specific feature of a cooperative, emphasizing its importance for the cooperative's stability. The provisions of Section 235 (1) set forth that "Upon its incorporation, the cooperative must create an indivisible fund in an amount of no less than 10% of its registered (basic) capital. This fund shall be supplemented by adding no less than 10% of the cooperative's annual net profit, until it reaches an amount equal to one half of registered (basic) capital of the cooperative. The statutes may determine that such cooperative's indivisible fund shall attain a higher proportion of registered capital or that other securing (reserve) funds shall be established." It is however necessary to add that should the value of such additional securing funds be deducted when establishing the value of the equity capital for the purpose of calculating a settlement share (in accordance with Section 233 (3) of the Commercial Code), the statutes must expressly so provide. As regards restricted use of the indivisible fund, the provisions of section 235 (2) of the Commercial Code state that "The indivisible fund may not be distributed among members during the existence of the cooperative." Should the cooperative violate its duty to create an indivisible fund (or the prohibition to distribute such fund among its members during the existence of the cooperative), this failure would, in connection with Section 257 (1) clause d) of the Commercial Code, be a reason for the winding up of the cooperative and its going into liquidation.

Credit unions are governed differently and the provisions of Section 235 of the Commercial Code shall not apply to them, as the Act on Credit unions contains specific provisions regarding mandatory funds to be created by the Credit union (specifically, the risk fund and reserve fund), provisions that the statutes can specify that higher risk fund and reserve fund be created, and that other funds may be created, where appropriate.

The Commercial Code also admits the possibility to distribute profit created by the cooperative among its members. This possibility however must be based on the respective provisions of the cooperative' statutes allowing distribution of profit (or its part) among members of the cooperative. Generally, the mandatory provisions on distribution of profit assume that reaching profit (and thus its subsequent distribution) is not objective of existence and activities of each cooperative. It consequently depends only on the statutes

it they allow for distribution of profits also among the cooperative's members (the statutes may concurrently determine manner of the distribution of profit other than the mandatory one). Specifically, Section 236 (1) of the Commercial Code set forth that "On approving ordinary financial statements, the member's meeting shall decide on the amount of profit to be distributed to the members)." The statutes may also expressly determine that profit reached by a cooperative shall not be distributed among its members (this may particularly apply to housing cooperatives or cooperative of social character). Concurrently, it follows from the wording of Section 226 (1) clause d) that profit may not be distributed amount the members even if the statutes fail to mention distribution of profits among its members at all; the necessary provision of the Statutes cannot be replaced by a resolution of the member's meeting. When it comes to determination of the specific amount to be distributed, the law entrusts the cooperative's member's meeting to do so; concurrently, it is not excluded for the statutes to determine the maximum part of profit which could be distributed among the members. The law concurrently specifies the manner of calculating the amount of a member's share in profits to be distributed in a supportive manner in a case where the cooperative does not arrange this issue in its statutes. The provisions of Section 236 (2) of the Commercial Code lay down that "Unless the statutes provide for otherwise, a certain member's share in the total distribution profit is computed on the basis of the ratio between the amount of his paid-up contribution and the amount of the paid-up contributions of all members. The share of members whose membership in the decisive year was less than one year shall be curtailed on pro rata basis." Furthermore, the provisions of Section 236 (3) provide that "The statutes or, if the statutes so admit, the members' meeting may determine another method of computing a member's share in the total profit to be distributed among the members." The provisions of Section 239 (4) clause d) relate to determination of the member's meeting exclusive powers. The cooperative's statutes thus play a significant role in the manner of distribution of profits; the provisions of Section 226 (1) clause f) (together with the provisions on settlement of loss, if any) are basic provisions of the statutes which are mandatorily stipulated therein.

Special Act on Support for Construction of Cooperative Apartments significantly deviates from the general principle laid down by the Commercial Code under which profits can be distributed among members of the cooperative (should the statutes so stipulate). Section 12 (2) of this Act provides that the statutes of a cooperative which is receiving support from the State Housing Development Fund to build cooperative housing must contain provisions pursuant to which the reached profit is not distributed among members and is to be used solely for activities connected with the construction and ensuring administration and operation of constructions owned by the housing cooperative.

As regards credit unions, the Act on Credit unions specifies in Section 9 (1) that "Profit can be distributed among members of a credit union. A member's share in profit is determined by proportion that the membership contribution bears to the aggregate sum of all the membership contribution as of the balance day of the annual financial statements.

The member's meeting shall, on negotiating the annual financial statement, adopt resolution on determination of profits to be distributed among the members, while taking into account a part of profits to be used for settlement shares. The provisions of The Commercial Code on distribution and use of profit created by a cooperative shall not be applicable."

3.7. Organizational profiles

Two levels of bodies of a cooperative are specified by the Commercial Code. On the one hand, they involve mandatory bodies (i.e., to be established mandatorily by law, though with certain exceptions laid down by law), on the other hand facultative bodies (i.e., established pursuant to the statutes to meet the cooperative's needs). Except for certain exceptions, the cooperative's bodies are traditionally collective bodies and only the cooperative's members are eligible to be such bodies' members. The cooperative's bodies can be classified as bodies consisting of all the cooperative's members (such as members' meeting, pr other bodies determined by the statutes – for example, partial members' meetings), elected bodies, particularly collective ones (board of directors, auditing commission or other bodies determined by the statutes – for example, commission for care for members, assembly of delegates or members' self governing bodies in objects owned by housing cooperatives), or one-member bodies) to be elected from the midst of the cooperative's members. There can also exist appointed bodies (other bodies determined by the statutes – for example different working commissions), providing however that the statutes provide for their creation by appointment and determine concurrently who is entitled to appoint such body and terms and conditions for such as appointment.

The basic cooperative's bodies are specified in Section 237 which reads that "A cooperative has the following bodies:

(a) the members' meeting (i.e. general meeting);
(b) a board of directors;
(c) an auditing commission;
(d) other bodies established under the statutes."

As regards membership in the cooperative's bodies, the provisions of Section 238 (1) read that "Only members of a cooperative who are over the age of 18 and representatives of legal entities that are members of the cooperative may be elected to cooperative bodies; the provision of Section 244a and of special rules of law governing election of members of the auditing company by employees shall not be affected thereby. Election made contrary to this provision shall be invalid." The provisions of the said Section 244a shall be applied if, according to the respective provisions of Act on Transformation of Commercial Companies and Cooperatives in case of over-border merger, the employees of the acquiring cooperative (who however are not members of the cooperative) are entitled to

elect a member or several members of the auditing commission of the cooperative. Furthermore, the provisions of Section 238 (2) stipulate that "If a legal entity is a member of a cooperative, it must authorize an individual to act for it in the cooperative's bodies."; the power of attorney must be in writing. The proxy on the basis of a power of attorney shall meet the same conditions as if he were a member of the elected body of a cooperative in persons, apart from the membership in the cooperative, and he may not grant anther power of attorney for this purpose to a third person."

The issues connected with the position and powers of the members' meeting of a cooperative, including basic requirements relating to convocation and holding of, voting at and minutes of the members' meeting are laid down in the provisions of Sections 239 to 242 of the Commercial Code.

According to the provisions of Section 239 (1) of the Commercial Code, "The supreme body of a cooperative is the meeting of the members of the cooperative" for which a legislative abbreviation "members' meeting" has been implemented by law. The provisions of Section 239 (2) stipulate that "The members' meeting is convened within a period laid down in the statutes, but at least once a year. The convening of the members' meeting must be communicated to the members in the manner specified in the statutes. A specific matter shall be included by the board of directors in the agenda of the members' meeting if so requested by one-third of the cooperative's members, the auditing commission or three delegates."

A group of at least three delegates belongs to persons entitled to submit the demand, if the cooperative's statutes provide for establishment of assembly of delegates.

According to the provisions of Section 239 (3) of the Commercial Code, "A members' meeting must be convened if at least one-third of all members of the cooperative or the auditing commission so demand in writing, as well as in other cases provided for in the statutes. Where a cooperative's board of directors fails to convene a members' meeting to be held within 40 days of delivery of an application to that effect, a person, who is authorized in writing by the persons or an body having applied for a members' meeting to be convened, is authorized to convene it. The members of the board of directors are jointly and severally liable to provide such person with a list of the cooperative members, or delegates, on this person's request."

According to Section 239 (4): "The powers of the members' meeting include the following: (a) alternation of the statutes; (b) election and dismissal of members of the board of directors and the auditing commission; (c) approval of the ordinary financial statements; (d) decisions on the distribution and use of a profit, or on the manner of payment of a loss; (e) decisions to increase or reduce the cooperative's registered (recorded) basic capital; (f) decisions on fundamental questions of the future development of the cooperative; (g) decisions on a merger by the formation of a new entity, a merger by acquisition, a division or another winding-up of the cooperative or conversion of its legal form; (h) decisions to sell or lease an enterprise or on other important property

transactions; (i) decisions to sell or other property-related instructions concerning real estate, including flats, or with flats; such decisions may be adopted by the members' meeting only after prior written consent is given by a majority of the housing cooperative members who are lessees of the real estate affected by the decision; this shall not apply if the duty arose to the cooperative to transfer a flat or non-residential space (premises) to a particular member's ownership where this member is the lessee of the said flat or non-residential space (premises)."

Deciding on entering into agreements according to Section 67a, (as mentioned in Section 239 (4) clause h)) involves deciding on entering into an agreement on transfer of an enterprise or its part, entering into agreement on the lease of an enterprise or its part, and entering into an agreement on pledge over an enterprise or its part.

The provisions of Section 239 (5) set fort that "A members' meeting may also take decisions on other matters concerning the cooperative and its activities, if so provided for in this Code or in the statutes, or if a members' meeting has reserved for itself the right to decide on such matters."

These additional matters falling within the exclusive powers of a members' meeting are referred to in certain additional provisions of the Commercial Code, for example Section 381 (5) (electing a member of a body where there exist an obstacle of such a membership in connection with the insolvency), Section 222 (2) (decision to apply to a member duty to pay indemnification exceeding such member's membership contribution", Section 223 (6) (a decision on members' duty to pay up their unpaid membership contribution prior to their maturity determined by the statutes, if it is necessary because of a loss suffered by the cooperative", Section 229 (1) (a decision to remove a member due on the grounds of refusal of an agreement on transfer of member's rights and duties), Section 231 (4) (a decision on an appeal raised by a member against his expulsion from the cooperative), Section 236 (1) (specification of profits to be distributed among the members while approving the annual financial statements and deciding on distribution and use of profits), Section 253 (negotiating the annual report on the management of the cooperative, if the annual report is prepared by the cooperative), Section 254 (2) clause a) and Section 239 (4) clause g) (deciding on winding-up of the cooperative), Section 258 (1) decision on continuing activities of a cooperative established for a limited period of time), and in Section 259 (2) (negotiating the proposal of the distribution of a liquidation remainder).

In case of a cooperative which obtains support to construct cooperative apartments from the State Housing Development Fund, certain specific requirements falling within the exclusive powers of the members' meeting are governed by Act No. 378/2005 Coll., particularly with respect to request for the financial support and its further settlement.

Given the fact that it might be difficult for certain cooperatives to hold a member's meeting as a whole (for example, for a housing cooperative with several houses, as well as for a production cooperative with several plants whose premises are large), the act allows that the member's meeting can be hold in the form of partial member's meetings. It

is a certain compromise between the member's meeting and assembly of delegates (which is particularly suitable for large cooperatives). As it follows from the wording thereof, partial member's meetings do not fulfil the powers of a member's meeting in its position similar to that of the assembly of delegates; it means that the holding and decision making of a member's meeting (as the supreme body of a cooperative) occurs in individual partial negotiations. The same rules as those governing the member's meeting apply to voting and decision-making of a member's meeting held in form of partial member's meeting. The agenda of the individual partial member's meetings must be identical, as it involves one meeting, even though it is held by partial meetings. Moreover, crucial principle of holding a member's meeting in form of individual partial member's meetings would be violated. The member's meeting of a cooperative shall not be deemed held until all the partial member's meetings are duly held. It is however not necessary that a resolution is approved by a majority of votes in each individual partial member's meeting. The power to decide in partial member's meetings is however restricted. The law sets forth specifically that partial member's meetings may not decide on the winding up of a cooperative. This rule follows from the provisions of Section 239 (6) of the Commercial Code which provides that "The statutes of a cooperative may lay down that the members' meetings be held in the form of a partial members' meeting. In voting on a resolution, the votes for such partial members' meetings shall be aggregated. Partial members' meeting may not decide on the winding-up of the cooperative and other matters, if this is specified in the statutes."

Another possibility how to overcome obstacles connected with convening a member's meeting as the supreme body of a cooperative (apart from partial member's meetings) is that the statutes specify that powers of the member's meeting be exercised by the assembly of delegates (i.e., an assembly of delegates is convened instead of a member's meeting, either exclusively, or a member's meeting is convened as well – in certain periods of time). The assembly of delegates however involves something else than partial member's meetings. Partial member's meetings are only a form in which member's meetings are held and decide; they involve direct participation of members in negotiating and decision-making. As opposed to that, the assembly of delegates is attended solely by elected representatives of members (delegates), meaning that it is an elected body of a cooperative with powers of the member's meeting (to the full extent or only with a specified powers). Contrary to partial member's meetings, the powers of the assembly of delegates are not restricted by law. The extent of powers of the assembly of delegates is thus set forth exclusively by the cooperative's statutes. The law however does not allow for the assembly of delegates to be established without restrictions and under any circumstances, it specifies clearly that only certain cooperatives are allowed to do so, provided that "where it is not feasible to convene member's meeting due to the size of the cooperative." It is true that it is up to the cooperative to evaluate this restriction, and thus it is subjective to a large extent. Specific legislation arises from Section 239 (7) which sets forth that "Where it is not feasible to convene a members' meeting owing to the size of the

cooperative, the statutes may specify that an assembly of delegates shall replace a members' meeting within the scope prescribed. Each delegate shall be elected by the same number of voters. The statutes may specify exceptions if these are necessary in view of the Organizational structure of the cooperative."

In numerous cases it is also necessary to solve the situation where the member's meeting does not have a quorum, i.e. is not attended by more than half of its members (as requested by the provisions of Section 238 (3)). This applies also to differentiation of voting rights, that is, if the statutes grant a different (higher) number of votes to different members (for example, relating to the amount of paid additional membership contributions).

According the Section 238 (3) of the Commercial Code, the number of the attending members is decisive for a quorum, and not the number of votes represented by them. This mandatory principle may not be changed by the statutes. For such a case, the provisions of Section 239 (8) of the Commercial Code set forth that "Where there is not a quorum at a members' meeting, the managing board shall convene a substitute members' meeting to take place within three weeks of the day on which the originally convened meeting was to have taken place. A substitute members' meeting must be convened by a new invitation which includes the same agenda. Invitations must be dispatched no later than fifteen days after the day on which the originally convened meeting should have been held, and at the latest ten days before the holding of such substitute members' meeting. A substitute members' meeting shall constitute a quorum, regardless of the provision of section 238(3). A similar procedure shall apply to partial members' meeting and to delegates' meeting."

If follows from the aforementioned that the replacement membership meeting does not have to be attended by a majority of the cooperative's members in order to make a quorum.

As regards legislation paid down by Act on Credit unions, it is necessary to refer to a difference arising from the Section 5a (2) thereof stipulating specifically that a replacement member's meeting of a credit union can be convened by the same notice of convocation as the original member's meeting. The notice of convocation must however contain a note that the replacement member's meeting is able to form a quorum disregarding the number of the attending members. The act sets forth also that the replacement member's meeting convened in such a manner may commence no earlier than thirty (30) minutes after the intended commencement of the original member's meeting as referred to in the notice of convocation. At the same time, the act allows the credit union's statutes to stipulate the necessary details.

The Commercial Code does not at all restrict a number of votes which might belong to one member of the cooperative (except for comprehensive requirements) while voting at a member's meeting. It depends therefore on the cooperative's statutes whether and how the higher number of votes belonging to one member is restricted. Specifically, the provisions of Section 240 (1) stipulate that "each member has on vote, unless the statutes

provide for otherwise. When voting on matters pursuant to Section 239 (4) clauses a), g) and h), each member shall only have one vote." The Commercial Code thus comprehensively specifies those cases where differentiation of votes cannot be used when voting at the member's meeting. In such a case, each member has one vote disregarding the wording of the statutes. This involves specifically voting on three matters set forth in 239 (4) clauses a), g) and h) which are considered to be of principle importance for the activities and existence of the cooperative. The first case involves voting on amendments to the statutes, next case is voting on winding up of the cooperative with a liquidation or change of the cooperative's legal form. The third case is deciding on the entering into an agreement pursuant to Section 67a), i.e. entering into agreements on transfer of the enterprise or its part, or agreement on a lease of the enterprise or its, part, agreements on pledge over the enterprise or its part, and deciding on other important property dispositions.

On top of this, the provisions of Section 241 (4) stipulate that "A notarial deed must be drawn up on the decision (resolution) adopted by a members' meeting if the cooperative's statutes are altered by such decision (resolution) and the approved wording of the altered statute must be included in the notarial deed."

The Commercial Code also defines manners of court protection of a members. Besides the aforementioned Section 231 (5) which defines court protection of a member upon his expulsion from the cooperative, the provisions of Section 242 and 243s deal with this issue as well. According to Section 242, a member may file a petition with the court for nullity a resolution passed by a member's meeting if statutory terms and conditions were met. On the one hand, these terms and conditions relate to the content of such a resolution, and on the other hand, to a manner in which the member shall proceed, including the respective time limits. The provisions of Section 242 (1) stipulate that "Acting on a petition (complaint) filled by a cooperative member, the court shall nullify a resolution passed by a members' meeting, if such a resolution contradicts statutory provisions or the statutes. A member may file a petition (complaint) with the court if he asked at the meeting which adopted the resolution that his objection be recorded, or if he notified the board of directors of his objection within one month of the day the members' meeting was held, or when such a members' meeting was not duly convened if he notified the board of directors within one month of the day he learned of its holding, however at the latest within one year after the day when it was held. A petition may be filled with the court only within one month of the day when the member asked that his objection be recorded, or within one month of the day when he notified the board of directors of his objection."

The act also provides for cases where a member objects that the respective provision has not been adopted at all; the provisions of Section 242 (2) stipulate that "Where a petition (complaint) pursuant to subsection (1) is based on the ground that the alleged decision (resolution) of a certain members' meeting was not adopted because such members' meeting did not vote on it, or that the content of the alleged decision does not

conform to the decision which the members' meeting adopted, a complaint may be filed with the court within one month of the day when the member learned of such decision, but no later than one year after the day when the members' meeting was held or allegedly held."

It results from the aforementioned that it is necessary to precisely distinguish between the legislation according to Section 1 and 2, both in light of legal reasons for filing the action by a member, and in the light of lapse periods for filing such an action. Both cases involve court protection of members generally; any member or a group of members are entitled to file the respective action with the court.

Another important body of a cooperative is the board of directors which, according to Section 243 (1) of the Commercial Code, "shall manage the activities of the cooperative and decide on all matters concerning the cooperative which are not reserved for another body according to the provisions of this Code or the statutes." Moreover, according to Section 243 (2), "the board of directors is the supreme body of a cooperative."

The provisions of Section 243 (3) relate to a member's meeting, defining also the manner of acting on behalf of the cooperative to the extent that "The board of directors implements resolutions of members' meeting and is accountable to it for its activities. The board of directors is represented by its chairman or vice-chairman, unless the statutes provide for otherwise. If, however, a legal act (transaction) effected by the board of directors requires a written form, then the signatures of at least two members of the board of directors are needed."

At the same time, according to Section 243 (5), "The board of directors elects a chairman of the cooperative (board of directors) from among its members, and possibly a vice-chairman, unless the statutes provide for their election by the members' meeting. The vice-chairman represents the chairman in the latter's absence. Other members of the board of directors may also be authorized to represent the chairman; the board of directors determines the sequence in which its members shall represent the chairman."

Furthermore, the provisions of Section 243 (6) stipulate that "The chairman of the cooperative convenes and chairs the proceedings of the board of directors. If the statutes so provide, the chairman also bodyizes and manages the every-day operations of the cooperative."

The position of a chairman is thus distinguished by law, depending on whether he is regarded to be a member of the statutory body (bodyizing and chairing the procedure of the board of directors), or a manager employed by the cooperative (bodyizing and managing day-to –day activities of the cooperative). Concurrently, the provisions of Section 243 (7) stipulate that "The statutes may specify that the cooperative's every-day operations are to be bodyized and directed by a managing director, who is appointed and recalled by the board of directors."

The act allows a cooperative to act relatively freely as regards frequency of meetings of the board of directors, as Section 243 (4) provides that "The board of directors meets as

necessary. It must meet within 10 days of receipt of a reminder from the auditing commission, if particular irregularities have not been rectified, despite an earlier notice from the auditing commission requiring their remedy."

Also, an auditing commission plays an important role in the Organizational structure of a cooperative; according to Section 244 (1), "Auditing commission" ("kontrolní komise") is authorized to audit all the activities of the cooperative and to consider complaints lodged by its members. The auditing commission is accountable only to the members' meeting and is independent of other cooperative bodies. The auditing commission has a minimum of three members." The provisions of Section 244 (5) stipulate that "The auditing commission elects its chairman, and possibly also a vice-chairman, from among its members, unless the statutes provide that they shall be elected by a members' meeting." Furthermore, the provisions of Section 244 (2) stipulate that "The auditing commission comments on the ordinary financial statements and on the proposed distribution of profit or settlement of a loss."

Concurrently, Section 244 (3) sets forth that "The auditing commission notifies the board of directors of any ascertained irregularities and requires that they be rectified." In relation to the aforementioned, provisions of Section 244 (6) stipulate that "The auditing commission is authorized to demand from the board of directors any information related to the financial management of the cooperative. The board of directors must report to the auditing commission, without undue delay, all facts which may have serious consequences for the financial management or position of the cooperative and its members. The same obligation also applies to the managing director."

When it comes to bodyizing activities of the auditing commission, Section 244 (7) sets forth that "The auditing commission may authorize one or more of its members to undertake individual acts in a certain matter; these members shall be authorized in this matter to demand information within the scope of the auditing commission's powers."

As regards frequency of meetings of the auditing commission, cooperatives are not allowed by law to act as freely as in case of the board of directors' meetings, as Section 244 (4) sets forth that "The auditing commission meets as necessary, but at least once every three months."

Legislation regarding the auditing company has been amended by adding Section 244a. This provision has been included in the Commercial Code by an amendment implemented by Act No. 126/2008 Coll. which amends certain acts in connection with adoption of Act No. 126/208 Coll., on Transformations of Commercial Companies and Cooperatives as regards cross-border mergers. It particularly reflects relation to provisions regulating "the right of employees of the acquiring corporation in a case of a cross-border merger" in cases specified by these provisions (Section 214 to 242 of Act No. 125/2008 Coll.). The provisions of Section 244a (1) specify that "should, in the manner and under the terms set forth by the Act on Transformation of Commercial Companies and Cooperatives, employees of the acquiring cooperative be, upon entry of the cross-border merger in the

Commercial Register, granted the right to elect and remove one or more members of an auditing commission of a cooperative which, following the registration of the cross-border merger in the Commercial Register, has its registered office in the Czech Republic, the cooperative shall establish the auditing commission; provisions of Section 245 shall not be applicable. The number of members of the auditing company elected by employees shall not exceed the number of members of the auditing company elected by the member's meeting."

The non-applicability of Section 245 is referred to because it relates to so called "small cooperatives" where the auditing commission is not elected. Furthermore, according to the provisions of Section 244a, (2) "should a cooperative which, following the registration of the cross-border merger in the Commercial Register, has its registered office in the Czech Republic and whose employees are entitled to elect and remove one or more members of an auditing commission, participate in a domestic merger within a period set forth by the Act on Transformation of Commercial Companies and Cooperatives, the same right shall arise for employees of the acquiring cooperative or its legal successor after registration of the domestic merger in the Commercial register; unless otherwise provided for by the by the Act on Transformation of Commercial Companies and Cooperatives. The provisions of the first sentence shall apply to the second and all the following domestic mergers wherein participates a cooperative which, following the registration of the cross-border merger in the Commercial Register, has its registered office in the Czech Republic and whose employees are entitled to elect and remove one or more members of an auditing commission, within a period set forth by the Act on Transformation of Commercial Companies and Cooperatives."

Possible extinguishment of the employees' right to elect and remove one or more members of the auditing commission is reflected by Section 244a (3) which sets forth that "should the employees' right to have one or two persons elected by employees as members of the auditing commission extinguish, the membership of persons elected by employees in the auditing company shall extinguish and the cooperative may proceed according to Section 245, if conditions set forth therein are met."

As mentioned above, the act allows a cooperative to regulate establishment and powers of additional bodies in its statutes. These bodies may be established only in cases and subject to conditions specifically laid down in statutes of the specific cooperative. Those are facultative bodies for which no requirements or conditions are laid down, nor demonstratively listed by law. The law thus allows a cooperative to regulate in its statutes other bodies, if any, absolutely freely, both in the light of purpose of activities of such bodies, and as regards the number of its members. However, should additionally bodies be established according to Section 237 d), it is absolutely necessary to comply with the statutory position and powers of the member's meeting, board of directors and auditing commission, and position or powers of such bodies may not be transferred to other bodies of the cooperative, if they were established.

Section 245 (1) which regulates bodies of a small cooperative provides additional possibilities regarding the Organizational structures to the extent that “Where the statutes so specify, the powers of board of directors and the auditing commission can be exercised by the members’ meeting, if the cooperative has less than fifty (50) members.” In such a case, according to Section 245 (2) of the Commercial Code, “The statutory body of such a cooperative shall be the chairman and possibly another member so authorized by the members’ meeting.” Article 245 (3) “the statutes shall determine the method of decision-making and the statutory body of a cooperative which has fewer than five (5) members consisting solely of legal entities” provides for even simpler procedure.

As regards conditions for membership in a cooperative’s bodies, the law specifies certain common provisions in Section 246 to 248. For example, Section 246 (1) specifies that „The statutes lay down the tenure of the members of the cooperative bodies, which may not exceed five years.”, and concurrently, Section 246 (2) specifies that “members of the initial bodies established after establishment of the cooperative may be elected for a maximum terms of three (3) years.”

A regards prohibition of competition, Section 247 (1) sets forth that “It is mutually incompatible to be concurrently a member of board of directors and the auditing commission.” And the provisions of 247(2) set forth that “The statutes may specify additional cases of incompatibility of offices or circumstances as a result of which a member of the cooperative may not be a member of an elected cooperative body.” Furthermore, the provisions of 249 set forth that: “Members of board of directors and the auditing commission, the procurators and the managing director may be neither entrepreneurs, nor members of statutory or supervisory bodies of other legal entities pursuing similar objects in their business activity. The statutes may alter the scope of the prohibition of competitive activity.”

The provisions of Section 248 regulate three connected issues, to wit procedure regarding resignation of an elected member of a cooperative from his office, possibilities for election of substitutes for members of the cooperative to replace a temporary member who has resigned from his office or whose function extinguished upon his death and furthermore, an institute of “alternate member of a body” has been introduced. This provision has been introduced for cases of resignation on office and substitutes for members of the elected bodies and is applicable directly by law, without it being necessary for the institute of the “alternate member” to be referred to in the statutes. If a cooperative has a substitute for a member of an elected body, this substitute shall take the place of the resigning member (or upon his death) in a sequence laid down by the statutes, and the “alternate member” may not be called upon. Also, as regards cooptation of the alternate member, this institute may be applied only upon resignation from the office or upon his death, and not in case when the member was recalled from his office.

Voting in the board of directors and auditing commission is regulated by Section 250 (1): “Each member of a cooperative’s board of directors and auditing commission has one

vote. Voting is public, unless the statutes provide that voting on certain matters must be by secret ballot. Secret balloting may be agreed upon by the body in question in particular cases." Furthermore, the provisions of Section 250 (2) stipulate that "Where the statutes so permit, a resolution may be adopted by voting in writing or by means of communication technology, if all the members of the cooperative body concerned agree to such a method of voting. In this case, all the individuals voting shall be considered as present at the meeting of the cooperative body in question", and the relating provisions of Section 238(3) stipulate that "Unless this Code provides for otherwise, resolutions of the members' meeting, board of directors, and the auditing commission are valid if the members' meeting, board of directors and the auditing commission were duly convened and attended by more than half of the members, and approved by a majority of the votes cast by attending members. This Code or the statutes shall prescribe which resolutions require the consent of a qualified majority." This requirement is laid down in the provisions of Section 381 whereby a qualified majority is requested for cases relating to obstacles to membership in a statutory body or another body of a legal entity which is an entrepreneur. Furthermore, a qualified majority (specifically approval of at least of two thirds of the attending members) is requested for decision-making of a cooperative relating transformation of the cooperative according to Section 23 (2) of Act No. 125/2008 Coll., on Transformations of Commercial Companies and Cooperatives.

Section 251 specifies that "Claims of the cooperative arising from liability of members of its bodies for harm are raised by the board of directors. Claims against members of the board of directors are raised by the auditing commission through a member appointed for this purpose." Concurrently, in case of the court protection as mentioned above, the provisions of Section 243a (1) stipulate that "Each member has the right to file a complaint in the name of the cooperative against a member of the board of directors or another body involved in management of the cooperative or its branch, seeking compensation for harm caused to the cooperative. A person other than a member of the cooperative who files a complaint r a person authorized by a member may not perform legal acts in such proceedings in the name or on behalf of the cooperative." According to the provisions of Section 243a (2), a member is not entitled to do so "if compensation for damage is claimed by the board of directors."

Specific regulation concerning bodies of a cooperative is vested in the Act on Credit Unions. Section 6 thereof introduces, in addition to bodies established according to the Commercial Code, another mandatory body for a credit union, to wit a credit commission "which consists of at least three members." A member of the credit union is not legible to become a member of the board of directors, member of the auditing commission of a Credit Union nor a person authorized to perform internal audit." According to Section 6 (3) thereof, the "Credit Commission decides on:

a) granting credits to members according to the statutes;
b) granting guarantees in form of securing ad bank guarantees for members;

c) securing credits.

3.8. Registration and control

According to the laws of the Czech Republic, cooperatives (as business entities which they are considered to be, disregarding their scope of business activities or scope of activities) are to be registered in a Commercial Register. The “Commercial Register” is a public list maintained by the competent Regional Court according to the registered office of the cooperative. Specifically, there are seven (7) Regional Courts in the Czech Republic, three (3) of them having one branch; altogether, there are ten (10) places maintaining a Commercial Register.

An entry into the Commercial Register (i.e., registration) has a constituent character, and therefore, a cooperative is incorporated only after effective registration in the Commercial register. If a cooperative is effectively established and complies with the conditions laid down for its registration in the Commercial Register, the court may not reject this registration (compared to other legal entities, the incorporation of a cooperative, except for a credit union, is not restricted by the laws of the Czech Republic).

Moreover, the Czech National Bank maintains evidence of credit unions and grants an approval for establishment and activities of a credit union (without this approval, a credit union may not be registered in the Commercial Register, and thus not incorporated).

As regards supervision, the cooperatives are subject to common supervising activities of state bodies as other legal entities. This supervision is particularly exercised over taxes, social and health insurance, occupational safety and health, anti-fire protection and other activities relating to activities of legal entities. Moreover, credit unions are subject to supervision of the Czech National Bank. Consequently, there exists no special supervision body solely for cooperatives.

3.9. Transformation and conversion

In the Czech Republic, transformations and changes of legal form of an cooperative are governed by Act No. 125/2008 Coll., on Transformations of Commercial Companies and Cooperatives which considers requirements laid down by Third, Sixth and Tenth Directive. This legislation is thus a general one, not a specific one relating solely to cooperatives. On top of the provisions relating both to commercial companies and cooperatives, this legislation however includes the specific provisions relating solely to cooperatives; specifically, approval of transformation in a cooperative, special provisions in domestic merger of a cooperative, special provisions on division of a cooperative, and special provisions on a change of the legal form of a cooperative. There are no specific provisions

regarding cross-border mergers of cooperatives, and a cooperative is thus regulated by the same provisions as commercial companies.

Methodology of the German act on transformations of companies ("Umwandlungsbereinigungsgesetz") from 1994 was used while compiling the act; thus, part one thereof contains general provisions which are common for all kinds of transformations of commercial companies and cooperatives, part two thereof regulates both domestic and cross-border mergers, part three their division, part four thereof transfer of assets to a member and part five a change of the legal form. At the same time, part two distinguishes between general provisions which are common for all kinds of commercial companies and cooperatives, and afterwards there are special provisions for individual kinds of commercial companies and cooperatives.

Concurrently, numerous regulations relating to transformation of commercial companies and cooperatives are governed separately in special acts (particularly, this involves taxes, certain aspects of bookkeeping and registration of transformation in the Commercial Register).

Furthermore, it is necessary to state that the act has assumed the basic principle of legislation governing both domestic and cross-border mergers and divisions consisting in the fact that (save for exceptions), no cross-border mergers and divisions between different kinds of commercial companies are allowed as it previous legislation laid down (until a separate act has been adopted) in the Commercial Code (in accordance with the Third and Sixth Directive). It has been neither required nor necessary to leave this principle de lege lata, nor has it been requested by business practice.

In respect to cooperatives, it is necessary to state that, even though a Member State is not obligated to permit cross-border mergers within the meaning of Articles 3 (2) of the Tenth Directive, such merger were allowed after consultations with the representatives of the Czech cooperative movement.

Generally, legislation is principally based on a rule that exceeding transpositions are not to be carried out, and thus it implements only such legislative measures which are necessary to comply with the purpose and meaning of the Tenth Directive. With respect to this principle, the duty to compile a report on reviewing the transformation project by the Supervisory Board of a limited liability company or a joint stock company, or by a cooperative's auditing company has been absolutely omitted. Also, the then duty on double execution of notarized records for capital commercial companies and cooperatives has been deleted. This duty requested that firstly, a notarized record certifying that the draft agreement on merger, agreement or project of division or an agreement on assumption of assets has been approved and secondly, it those agreements had to be executed in the form of a notarized record as well.

Specifically, Section 2 thereof sets forth that "transformation can be made by

a) merger;
b) division;

c) transfer of assets to a member, or
d) by a change of the legal form".

According to Section 23 (1) of the act, "transformation of a cooperative shall be approved by the cooperative' members' meeting by (according to Section 23 (2) "at least two thirds of the attending members", and " a higher majority votes can be required by the statutes." Concurrently, Section 23 (3) the law sets forth that "a notarized record to which the transformation project is attached shall be executed with respect to a decision of the members' meeting on its transformation."

Section 166 sets forth that, besides common requirements, "Furthermore, draft terms of domestic merger of a cooperative shall determine a manner in which the amount of membership contributions and other property participation shall be changed, or state that the amount of membership contributions and other property participation shall not be changed for any member."

Furthermore, the provisions of Act No. 167 (1) stipulate that "prior to submitting draft terms of domestic merger to the members' meeting for its approval, such draft terms shall be reviewed by an expert for domestic merger for each of the participating cooperatives, or one expert for domestic mergers for all the participating cooperatives." The provisions of Section 167 (2) set forth that: "The expert's report on a domestic merger shall not be requested if all the members of the participating cooperative for which such a report is to be prepared have so agreed".

Furthermore, Section 170 provides that "Members of the participating cooperatives shall notified of their rights in the invitation for a members' meeting or notice of convocation of the members' meeting which is to approve the domestic merger. This invitation or notice shall include selected data from the annual financial statements."

Special regime has been established in the interest of protection of the cooperative's members who disagree with its domestic merger. A member who disagreed with such a merger can withdraw from the cooperative subject to very mild formal requirements. In favour of the cooperative's protection, only a short lapse period has been established within which the member can withdraw from the cooperative (thirty (30) days from the day on which the domestic merger has been approved by the members' meeting). A membership of the withdrawing member shall be terminated upon the entry of the domestic merger in the Commercial Register and it shall not be created in the acquiring cooperative. As it is assemblies of delegates which decides in numerous cooperatives, such a member is not bound by a decision of his delegate and may withdraw from the cooperative at his own discretion. The right to withdraw is however also granted to a delegate who voted for the domestic merger, because the delegate does not act according to his own will, but follows the members' orders. Thus is may not be admitted that a delegate who disagrees with the domestic merger, however, according to orders of (a majority of) member represented by him voted for approval of the project, be prohibited from withdrawing the cooperative. In this relation, the act sets forth that, it is not possible to

file a proposal for entry of the domestic merger into the Commercial Register until this period lapses.

The act also contains restrictions aimed to protect lessee's of cooperative apartments to the extent that a housing cooperative can only merge in this republic with another housing cooperative.

As regards cross-border merger of a cooperative (which is, in this respect, regulated by the same provisions of other commercial companies), it is necessary to state that Section 202 (1) of the act sets forth that "In approving the cross-border merger, the general meeting or the members' meeting of each of the participating Czech corporations may reserve the right to be convened once more in order to approve the manner and extent of the involvement of employees of the Czech or foreign acquiring corporation, unless the manner of the involvement of employees has been known; in such a case, shareholders or members must have been familiarized therewith, and the approval of the cross-border means that also the manner of involvement of employees has been approved." Furthermore, Section 202 (2) sets forth that "Should the manner of the involvement of employees be approved by the general meeting or the members' meeting later on, it shall be approved in the same manner and by at least the same number of votes as the cross-border merger." Section 202 (3) sets forth that "A notarial statement shall be executed on resolutions of the general meeting or the members' meeting whereby the manner of the involvement of employees of the acquiring corporation has been approved." Subsequently, According to Section 203 sets forth that "A failure to approve the manner of the involvement of employees shall render the registration of the cross-border merger impossible."

Division of cooperatives (project of divisions and its review, approval etc.) is governed by Sections 320 through 336 and has been formulated with the same generally binding legal content as regards domestic mergers. Special regime has been established in the interest of protection of the cooperative's members who disagree with its division. A member who disagreed with such a merger can withdraw from the cooperative subject to very mild formal requirements. As the legislation is identical to that governing domestic merger of cooperatives, it is not repeated here, but refers directly thereto. Identically to domestic mergers, the act stipulates that it is not possible to file a proposal for entry of the division into the Commercial Register until this period within which members may withdraw from the cooperative lapses.

In relation to division of housing cooperatives, the legislation contains several significant provisions. Particularly, in order to protect lessees of cooperative apartments and non-residential premises, only housing cooperatives may participate in all forms of division. Furthermore, there exist special rules ensuring that a member who is a lessee of a cooperative apartment or cooperative non-residential premises becomes or remains (in case of division by splitting) member of the subject which is the owner of real estate or its part that his member uses, so all his rights may be preserved. Concurrently, there has

been stipulated mandatory rules for re-calculating the amount of property participation of a member who is a lessee of a cooperative apartment or cooperative non-residential premises in case of a division of the cooperative, and binding rules for determining which members shall become members of the divided cooperative and which become members of the acquiring cooperative. Any provisions of the project on division which are contrary to the mandatory legislation are ineffective, and direct effects of mandatory legislation shall apply. Concurrently, as opposed to other entities where membership of a certain member in the divided housing cooperative terminates, the act stipulates that in case of a division of a housing cooperative by splitting an approval of all the members of a cooperative is not required. This protective measure which is otherwise necessary is not required in this case, as the law protects the member by formulating mandatory provisions which are not given for entities other than housing cooperatives, and their member must therefore be protected by requirement of unanimous adoption of the respective decisions.

For practical reasons, legislation relating to a change of the legal form, identically to domestic mergers and divisions, allows a cooperative (identically to legislation relating to a limited liability company and a joint stock company) to publish the project of a change of the legal form without mentioning person to serve bodies of the commercial company or the cooperative after change of its legal form. Section 393 allows members who disagree with a change of the legal form to withdraw from the cooperative. Membership shall cease to exist as of the day of entry into the Commercial Register. As regards a housing cooperative, the act stipulates in Section 384 that “A housing cooperative may change its legal form only of all the members of the housing cooperatives so agree; this approval may not be replaced by approval of all the delegates.”

3.10. Specific tax treatment

Tax regime of the Czech Republic is in its principle identical for all legal entities (certain specific provisions are given only for non-profit organizations). Subsequently, there exist no specific regime for cooperatives in the Czech Republic.

3.11. Existing draft proposing new legislation

After 2000, works on re-enactment of the private law (namely the Civil Code and Commercial Code) were initiated. In spite of certain complications, in 2009 drafts of such re-enactment were finalized and consequently, on May 7, 2009, drafts of the new Civil Code and the Act on Commercial Companies and Cooperatives (which should replace the originally intended Commercial Code, as any and all business obligations were included in the Civil Code, and only the original legislation relating to commercial companies and

cooperatives remained in the original Commercial Code). After the lower house of the Parliament of the Czech Republic voted to declare no confidence to the then Czech Government, the debating of the draft was suspended in the Parliament (in the stage of the first reading), as the government of clerks' intention is to leave the debating of significant drafts to a new political government and the parliament to be elected in May of this year. Only then shall we know whether the prepared drafts are to be used or amended.

As regards cooperative legislation, it is necessary to add that a draft of a separate act on cooperatives was prepared in 2000 by the representatives of the cooperative system (Cooperative Association of the Czech Republic and the individual national cooperative unions). To a certain extent, this draft was based on the then knowledge of the state of preparing the Statute for a European Cooperative Society. Though this draft was prepared by representatives of all the cooperative sectors, it was not fully supported by the cooperative public. Particularly, as regards entrepreneurial cooperatives, legislation laid down in the Commercial Code and governing also other business entities was preferred over a separate act. This was also one of the reasons why the then government failed to support the draft act on a cooperative. Though it was introduced to the Chamber of Deputies of the Parliament of the Czech Republic based on deputies initiative, it has been rejected in the first reading.

Also, in elaborating the aforementioned re-enactment of the private law, the Statute for a European Cooperative Society was taken into consideration when formulating a draft for the new cooperative legislation. Particularly, the introduction of so called "new contributions" was considered. These new contributions could be invested in the cooperative (if the statutes so provide) both by members (as the new class of a membership contribution) and investor who are not members of the cooperative (similarly to non-user in the meaning of SCE). While dealing with the commentary proceedings, this provisions has been deleted after discussions among the cooperative representative and the Czech National Bank).

In the light of the own draft cooperative legislation, it can be stated that the definition of a cooperative as "association of an unrestricted number of persons (i. e., members) established for the purpose of carrying on business activity or meeting economic, social or other needs of its members or third parties" has been amended. Also, the minimum required number of the cooperative's members has been decreased to be three (3) persons, no matter if they are natural persons or legal entities. Additional provisions were added to the procedure of decreasing and increasing the basic membership contributions, the cooperative share has been defined to the extent that it represents "the member's rights and duties arising from his membership in the cooperative", the manner of its transfer and devolution, including its division, if any. Maximum attention was given to the manner in which the cooperative bodies negotiate, regulation of position of the assembly of delegates as the cooperative's body, as well as to detailed regulation of a housing

cooperative. The draft has newly introduced the legislation relating to a social cooperative. Though the cooperative's representatives were enabled to participate in the preparation of the draft, they do not consider the draft to be absolutely satisfactory, as certain of their requirements or objections were not accepted.

In connection with the aforementioned (particularly, election for the new Chamber of Deputies of the Parliament of the Czech Republic) is it difficult to envision whether the said draft will be used or newly formulated in the legislative process.

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4. The SCE Regulation and national law on cooperative

Cooperative legislation in the Czech Republic (as it follows from III above) is vested in the Commercial Code (Act No. 531/1991 Coll.) which has been amended several times. This legislation is relatively simple and, in spite of certain restrictive amendment, quite liberal (possible the most liberal one as regards legislation governing legal entities). The law contains numerous directory (non-mandatory) provisions and thus allows the statutes of a cooperative to include its own regulation corresponding to the conditions an requirements of specific cooperatives.

Specifically, the cooperative's statues may deviate from the law in the following issues:

- stipulating a time-limit shorter than three (3) years for payment of membership contribution exceeding a member's initial membership contribution (Section 223 (6);
- stipulating body which decides on a member's expulsion from the cooperative Section 231 (4), third sentence;
- determining settlement share upon termination of membership during the existence of the cooperative (Section 233 (5) in connection with 233 (2) and 233 (4);
- determining time-limit for payment of a settlement share (Section 233 (5);
- creation of the division fund in an amount higher than statutory one, creation of other securing (reserve) funds (Section 235 (1);
- determining a member's share in profits (Section 236 (2) and 236 (3));
- determining size (weight) of a member's vote while voting in the cooperative's membership's meeting (Section 240 (1), along with restriction to determine a differentiated size of votes while voting on matters referred to second sentence of Section 240 (1));
- acting on behalf of the board of directors with respect to third parties (Section 243 (3) second sentence;
- electing chairman of the cooperative (the board of directors), or its vice-chairman (Section 243 (5) first sentence, that means not by the Board of directors but directly by the member's meeting);
- electing chairman of the auditing commission, or its vice-chairman (Section 244 (5), that means not by the Auditing commission but directly by the member's meeting);
- the powers of the board of directors and auditing commission in a small cooperative may be vested in the member's meeting where the chairman or another member's authorized by the member's meeting shall be the statutory body (Section 245 (1));
- possibility to prohibit re-election of a member of the cooperative's body (Section 246 (3));

- determining a body which will negotiate resignation of a member of a cooperative's body from his office (instead of a body which elected such member) (Section 248 (1), second and third sentence);
- regulating the extent to which competition is prohibited (Section 249);
- manner of electing liquidators upon entry into liquidation of a dissolved cooperative (Section 259 (1), second sentence and
- manner of distribution of the liquidation remainder and distribution of remainder of the liquidation surplus among the cooperative's members upon dissolution of the cooperative with liquidation (Section 259 (3);

As the Act on European Cooperative Society which comprehensively relates to the Directive brings in a detailed regulation, only minor adjustments were made to existing legislation (namely the Commercial Code, Notary Rules, Labour Code and Civil Procedure Code) to provide for compliance with the Directive.

In the light of the aggregate cooperative legislation in the Czech Republic, it is necessary to state that, as compared with other legal entities, virtually no restrictions (except for the aforementioned) have been imposed on a cooperative's activities; on the other hand, cooperatives are not granted any special advantages.

Though the cooperative system has existed in the Czech Republic since 19th century, numerous leading politicians fail to have the necessary knowledge about this system and its history, and this is why they often react to it negatively. However, thanks to the individually cooperative unions and their involvement in public life, it is possible to promote the cooperative system and eliminate negative impact, if any, which might arise from changed legislation.

As regards mutual relations of the Directive and national cooperative legislation in the Czech Republic, it is possible to conclude that these rules of law comply to each other in the extent requested for their proper application to the practical life. Concurrently, it is necessary to state (namely based on statements of requested persons) that the Directive has a very complicated wording with numerous complicated procedural requirements and a large possibility for the involvement of employees in decision-making of cooperative societies (which is not possible in the Czech Republic in relation to national cooperatives. Obviously, this is why this form has not been used in the Czech republic to date.

DENMARK

By Gurli Jakobsen

SUMMARY. Introduction . **1.** The implementation of SCE Regulation 1435/2003 in Danish legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.2.1.** Obligations. – **1.2.2.** Options for Member States. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **2.** A comment on the implementation of the SCE Regulation in Danish legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.2.1.** General definition and registration. – **3.2.2.** Definition of cooperatives and tax treatment. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Literature and references. – **4.** The SCE Regulation and national law on cooperatives. — **Appendix A**. Overview of the Law texts and regulations used in the analysis. **Appendix B**. Terminology/Technical vocabulary relating to legislation and cooperatives.

Introduction

Cooperative companies are not regulated by material legislation in Denmark. There is no general national act regulating cooperative societies. Cooperative issues are regulated by legislative practice, by-laws of the particular cooperative society, and customary practice in the area. These various sets of rules constitute together a law on cooperative business activity in Denmark. This situation has to be taken into account when analyzing the implementation of the SCE regulation into the Danish legislation. The way to work has been to collect the Acts and other legislation relevant for submission to the wider SCE project[54]. Moreover, information and opinions have been collected from a questionnaire addressed to representatives from National Cooperative Federations and others with key insight into the issue of Cooperatives and European legislation on the matter.

Section 1 presents a mapping of the Danish SCE Act against the EU-SCE regulation showing how the measures that each Member State should adopt to national legislation have been conducted, and likewise for the options for measures left open for Member States to apply or not. Not surprisingly, one will notice the influence of the legislative philosophy on cooperative activity in Denmark as to how measures have been adopted.

Section 2, dealing with the implementation of SCE in Denmark, will naturally also take this fact into account, and will integrate the information gathered from the questionnaires to representatives from organizations within the cooperative movements, public bodies, and legal scholars. In addition to the questionnaire, their reflections and opinions on the

[54] The acts et al. have been forwarded to the project database in Danish and, when available, in the English version. For an overview, see Annex A.

degree of knowledge of SCE in the country and what are considered possible dissuasive factors will be presented. . To this day, no SCEs based in Denmark have been created. The overview of national cooperative law is described in section 3.

1. The implementation of SCE regulation 1435/2003 in Danish legislation

The EU Regulation on the European Cooperative Society (SCE regulation 1435/2003; SCE-forordning) of July 2003 required explicitly that Member States take measures necessary for its implementation in the member country. The Danish Parliament passed the "Danish SCE Act" on May 22, 2006: Act no.454 Lov om Det Europæiske Andelsselskab, called "SCE-loven".

This section will deal with the specific measures adopted for SCE companies having their statuary home address in Denmark and for natural or legal persons involved in the formation of an SCE. The EU-SCE Regulation also lists a series of options for each member country to consider[55].

The legal hierarchy of an SCE is as follows: An SCE shall be governed a) by the SCE Regulation; b) by the statutes of the SCE where authorised by this Regulation; c) in the case of matters that are not regulated by this regulation, by (i) the laws of implementation of the SCE regulation adopted by member states, (ii) The laws of the Members States which would apply to a cooperative formed in accordance with the law of the member state in which the SCE has its registered office; (iii) the statutes of the SCE.[56] An essential question is how to interpret this in countries with no national act. In a declaration addressed to the EU Council Protocol of July, 22nd, 2003 (123/03)[57], it is stated that "where the SCE regulation refers to or presupposes national legislation on cooperatives, for the case of Denmark, this will refer to both rules in acts, administrative indications as well as to similar and analogous rules or practice" - i.e. "andelspraksis"[58]. The content of the Danish SCE Act is naturally marked by this situation of how to create compatibility between the SCE regulation and the Danish cooperative legal reality.

[55] This Danish SCE Act, as well as most of the acts and other legislation referred to when dealing with national cooperative enterprises in Denmark, have been forwarded to the eurisce-ekai database electronically in the official Danish language version, and in the unofficial translation into English as available on the Homepage of the Danish Commerce and Companies Agency (DCCA) (Erhvervs- og Selskabsstyrelsen). http://www.eogs.dk/sw30295.asp

[56] SCE regulation, Article 8

[57] http://eogs-lw.lovportaler.dk/ShowDoc.aspx?docId=lfo20056133-full. Translated from "Baggrund for Loven: 1.3. SCE-forordningens hovedindhold og retskildehieraki."

[58] This includes labour market agreements negotiated between labour unions and national cooperatives on matters of employee representatives being members of the elected board of Danish cooperatives with a right to speak and vote.

1.1. Source, time, and mode of implementation

The SCE regulation was implemented in Denmark by a special act - Act No. 454 of May 22, 2006: The Danish Act on the European Cooperative Society (SCE-loven), is available in English language. Registration of an SCE has been regulated through Government Executive Order (Bekendtgørelse) no.1525 of Dec.13, 2007 (available in English language).

1.2. Structure and main contents of the regulation

The Danish SCE Act applies the requirements of the EU-SCE regulation. The structure and content of the act follows the general line of legislation for cooperative type companies in DK; which is not to make specific legislation on the nature of the cooperative specificity, except from the principles of how surplus is distributed in cooperatives and in the case of certain types of cooperatives e.g. financial SCEs, parallel to what exists for national financial cooperatives. The next section analyses how each of the articles of SCE Regulation 1435/2003 that impose measures or grant options, respectively, are reflected, or not, in the Danish SCE Act.

1.2.1 Obligations

Mapping of the **s**ubject matters for which Member States have to take measures in order to implement regulation 1453/2003 and how this has been dealt with in the Danish SCE Act.

		SCE reg. Article imposing obligations	**DK provision implementing**
1	*Art. 4.6*	*Capital of SCE – concerning appointment of experts and the valuation of any consideration other than cash – applies by analogy to the SCE*	The Danish SCE Act has made extension of the regime applied to public limited-liability companies for the control of the considerations in kind to the SCE The appointed institution is DCCA (the same as for public limited liability companies). See the Danish SE Act of Oct.8.2004. Part 3 §5. For Danish cooperatives there is no requirements of capital
2	*Art. 7.8*	*Transfer of registered office*	The competent authority that issues the certificate to the completion of the acts and formalities to be accomplished is the DCCA. See DK-SCE-Act, part 2 §4.5 and part 3 §5.1-5.
3	*Art. 11.1*	*Registration and disclosure requirements*	DK-SCE-Act, part7§14. The DCCA is the public authority in charge of these tasks. For activities falling under the Danish Financial Business Act, the competent authority is the Danish Financial

			Supervisory Authority (Finanstilsynet)
4	*Art. 26.1*	*Report of independent expert for the merger* (same experts as in art.4§6)	DCCA is the competent authority
5	*Art. 29.2*	*Scrutiny of merger procedure* (same authority as in Art.7)	DCCA is the competent authority
6	*Art. 30.1*	*Scrutiny of legality of merger*	DCCA is the competent authority. See part 2 §4
7	*Art. 35.5*	*Procedures for formation of conversion*	See part 2 §4 on the formation of SCEs.
8	*Art. 70*	*Auditing*	The general regime for auditing for commercial companies applies. See the Danish act on financial statements of commercial companies (Årsregnskabsloven) (§3.4) where Cooperatives with limited liability has to have an authorized auditing (§7 and §135) and (§4.1) for exceptions from this requirement.
9	*Art. 73.1*	*Winding-up*	See DK-SCE Act part 6 §13. The DCCA is the competent authority to require the winding-up if necessary. See section 21(2) of the Danish Act on undertakings carrying on Business for profit
10	*Art. 76.5*	*Conversion of SCE into a cooperative*	DCCA is the authority attending to the control of assets in this process e.g. by approving evaluators.
11	*Art. 78.1,2*	*National implementing rules*	DCCA

1.2.2 Options for Member States

Since the end of the 19th century the cooperative movement in Denmark has opposed a national act on cooperatives. There is a law (set of rules) but not a national legislation, as will be described later in this report. As already said, this situation is reflected in how the options have been adopted or not in the Danish SCE Act. Thus it does not provide measures enabling or facilitating the formations of SCEs in particular. As there are no specific restrictions, obligations of obstacles related to the nature of the business or the free exercise of certain activities that can be carried out by an SCE, the Danish SCE Act appears as an act of "minimal interference".

In the table below there is an overview of the various options allowed in the SCE Regulation and how they have been reflected or applied in the Danish SCE Act when relevant.

Table of implementation of options in SCE reg. to the Danish context

No	SCE REG. PROVISION	CONTENT OF THE OPTION	IS THE OPTION IMPLEMENTED?	NATIONAL IMPLEMENTING LAW PROVISION
1	Art. 2, par. 2	to permit that a legal body the head office of which is not in the Community participates in the formation of an SCE	YES	Art. 3, Law 454/2006
2	Art. 6	to oblige the SCE to locate the head office and the registered office in the same place	YES	Art. 2 and 13, *ibidem*
3	Art. 7, par. 2	to provide additional form of publication for the transfer of the registered office	NO	
4	Art. 7, par. 7, subpar. 1	to provide requirements for the protection of the interests of creditors and holders of other rights in case of transfer	YES, the transfer has no effects as long as claimants and cooperative reach an agreement or, in case of disagreement, before the ruling of the bankruptcy court; there is also a particular protection for the customs and tax administration; moreover, after publication of the transfer proposal, the SCE shall include in its name "under transfer"	Art. 5, par. 1, 2, 4, 5, *ibidem*
5	Art. 7, par. 7, subpar. 2	to extend the application of art. 7, par. 7, subpar. 1, to liabilities that arise, or may arise, prior to the transfer	YES, until 2 weeks after publication of the transfer proposal; until the transfer where the claimant is the customs and tax administration	Art. 5, par. 3, *ibidem*
6	Art. 7, par. 14	to prohibit the transfer of the registered office in case of opposition by competent authorities	YES, the opposition may be submitted by the Minister for Economics and Business Affairs in the case of undertakings subject to supervision by the Financial Supervisory Authority	Art. 17, par. 1, *ibidem*
7	Art. 11, par. 4, subpar. 2	to entitle the management organ or the administrative organ of the SCE to amend the statutes without any further decision from the general meeting in the case described by art. 11,	YES this is the option chosen	Art. 12, *ibidem*

		par. 4, subpar. 1		
8	Art. 12, par. 2	to derogate from the national provisions implementing Directive 89/666/EEC in order to take account of the specific features of cooperatives	NO, but the Danish Commerce and Companies Agency may provide for such derogations. It has not happened.	Art. 15, par. 2, *ibidem*
9	Art,14 Par.1	On admitting investor (non-users) members	NO – The Act does not pronounce itself on investor membership. This would normally be a matter of the company by-laws for Danish coops	
10	Art. 21	to prohibit a cooperative to take part in the formation of an SCE by merger in case of opposition by competent authorities	YES, the opposition may be submitted by the Minister for Economics and Business Affairs in the case of undertakings subject to supervision by the Financial Supervisory Authority	Art. 17, par. 1, *ibidem*
11	Art. 28, par. 2	to ensure appropriate protection for members who have opposed the merger	YES, by entitling dissenting and non-voting members to withdrawal and to the repayment of their personal accounts with the cooperative pursuant to the provisions of the statutes of the cooperative; moreover, conditioning the issue of the certificate of art. 29, par. 2, SCE Reg., to the provision of acceptable (according to experts appointed by the court) security with respect to withdrawing members' claims against the cooperative	Art. 3, par. 1-5, *ibidem*
12	Art. 35, par. 7	to condition conversion on a favourable vote of a qualified majority or unanimity in the controlling organ of the cooperative within which employee participation is organised	NO – The issue of employee participation in the board is regulated through social dialogue in DK.	
13	Art. 37, par. 1	to provide for the responsibility of the managing director	YES	Art. 6, par. 3, *ibidem*
14	Art. 37, par. 2, subpar. 2	to require or permit an SCE's statutes to provide for the appointment and removal of the members of the management organ by the general meeting	NO	
15	Art. 37,	to impose a time limit on	NO	

	par. 3	the period indicated therein		
16	Art. 37, par. 4	to fix a minimum and/or maximum number of members of the management organ	YES, minimum 1	Art. 7, par. 2, *ibidem*
17	Art. 37, par. 5	to adopt appropriate measures for the two-tier system	YES, reference made by way of analogy to the cooperative practice and legislation in general applicable in cooperatives to the boards of directors and the executive board, with a preference for the first in case of conflict; the Minister for Economic and Business Affairs may lay down rules in this respect within its sphere of competencies	Art. 6, par. 1, 2, 4, 5, *ibidem*
18	Art. 39, par. 4	to stipulate the number of members or a minimum and/or a maximum number or the composition of the supervisory organ	YES, minimum 3	Art. 7, par. 1, *ibidem*
19	Art. 40, par. 3	to entitle each member of the supervisory organ to require the management organ to provide information	NO	
20	Art. 42, par. 1	to provide for the responsibility of the managing director	YES	Art. 9, par. 3, *ibidem*
21	Art. 42, par. 2	to set a minimum and, where necessary, a maximum number of members of the administrative organ	YES, minimum 3	Art. 9, par. 1, *ibidem*
22	Art. 42, par. 4	to adopt appropriate measures for the one-tier system	YES, reference made by way of analogy to the cooperative practice and legislation in general applicable in cooperatives to the boards of directors	Art. 8, par. 1, *ibidem*
23	Art. 47, par. 2, subpar. 2	to limit the power of representation in the event described therein	YES – the SCE is not bound vis-a-vis 3rd parties in cases referred to in art.47par.2	Art. 10, *ibidem*
24	Art. 47, par. 4	to provide for the enlargement of statutes' capacity to regulate the power of representation	NO	
25	Art. 48, par. 3	to dictate particular provisions on operations requiring authorisations	NO	

26	Art. 54, par. 1	to provide about the date of the first general meeting after incorporation	YES	Art. 11, *ibidem*
27	Art.59 Par.2	Possibility to introduce multiple votes	NO	
28	Art. 59, par. 3	Voting rights to non-user (investor) members	NO - Nat. legislation does not pronounce itself on that	
29	Art.59 Par.4	On the participation of employee's representatives in the general meetings or in the section or sectorial meetings	NO – employee participation in the bigger cooperatives' boards, as well as in section meetings or sectorial meetings with a right to speak and vote exists in Danish Coops, but this is not a legislated matter; it is a product of negotiations of the labour market parties. (so called Danish model of social dialogue)	
30	Art. 61, par. 3, subpar. 2	to set the minimum level of special quorum requirements indicated therein	NO	
31	Art. 68, par. 1	to derogate from the national provisions implementing Directives 78/660/EEC and 83/349/EEC in order to take account of the specific features of cooperative	NO	
32	Art71	System of auditing	NO; the general system for auditing, however, applies to cooperatives with limited liability (a.m.b.a.)	
33	Art. 77, par. 1	to permit the expression of capital in Euro (where the third phase of EMU does not apply)	NO	
34	Art. 77, par. 2	to permit that accounts are prepared and published in the national currency (where the third phase of EMU does not apply)	NO	

1.3.-The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The designated authority is "Erhvervs- og Selskabsstyrelsen" = "The Danish Commerce and Companies Agency (DCCA), an agency under the Ministry of Economy and Industries.

2. Comment on the implementation of the SCE regulation in Danish legislation

The SCE Act has been implemented in Denmark in a way that is compatible with Danish cooperative law and practice, both with regard to the practice of the cooperative principles and the legal regulation around cooperative business activity in Denmark, thus making it possible to apply the Regulation in a conversion, being a cooperative founded under Danish law. At the time of the formulation of the SCE Regulation the Danish stakeholders within the established agricultural cooperative movement and the Danish Commerce and Company agency took a very active interest in formulating a regulation that also responded to Danish tradition and practice. With a record of 0 SCE companies registered in Denmark[59] to this date, one of the interesting questions clearly is why this regime has not yet appealed to Danish cooperatives going international. The interviews did not give any indication on whether there are plans to set up a cooperative according to the SCE Regulation in DK.

To answer the question of what will be the dissuasive factors, one will have to look into which sectors and what business areas are the object of the potential for cross-border cooperatives. Within the established cooperative sectors in Denmark with a strong presence on the national market, consumers' cooperatives and agricultural producer cooperatives/agro-industry (for the latter also internationally), there has been and are several cross-border business cooperative experiences. The national consumer cooperative, Coop (formerly FDB Foreningen af Danske Brugsforeninger), had for a few years a close cooperation with the Swedish and Norwegian counterparts with a view of an institutional integration also. This, however, did not prosper, and the inter-Scandinavian collaboration of the consumer coop organizations is now at a commercial level. Arla Food was constituted in 2000 as a result of a merger between the Danish MDFoods and the Swedish Arla – both dairy cooperatives. Both are companies with a long trajectory as farmer-owned producer cooperatives. At the time, the upcoming regulation was in play as an alternative. But when constituted, its legal form became a Danish cooperative "Arla Foods a.m.b.a." and registered in Denmark. The board, however, is composed of both Danish and Swedish farmers. Membership is constituted both by individual farmer members and groups of farmers, in the concrete case "Arla-Economic Association" is a member. Swedish farmers may be both a member here and individually of Arla Foodsa.m.b.a. Recently Arla Foods has also included British farmers in its group of co-owners.

The most used way of internationalizing the operations of the Danish agro-industrial producers' cooperatives has been through the formation of public limited liability companies A/S operating abroad, and not by creating cooperatives with local producers as members. This was the case of Tulip and of Danish Crown (both bacon and other pork

[59] Data from DCCA - The Danish Commerce and Companies Agency, given in June 2010

meat products). There are experiences where the capital of the internationally operating companies has been constituted by a combination of cooperative capital from the mother cooperative company (typically a minimum of 51%) and a group of financial investors typically certain pension funds with a long term investment horizon.

The responses from the interviewees to the question of dissuasive factors indicate that *cultural factors* are at play here. Cooperatives within the traditional sectors are geographical, and they are founded on a culture of being united within a cultural geographical area. Other informants estimate that the *need is not there* yet, and finally the existence of *differences in national regulation and/or practice to the SCE* is given some importance. In none of the interviews were the characteristics of the regulation as such given importance as dissuasive factors. So from this evaluation I would advance the hypothesis that a future SCE with its address in DK will rather be a start-up than a conversion of an existing cooperative and probably within a new sector. One can imagine an international consultancy company or similar. But, as said, this is, at this point, pure speculation.

Speaking about other business sectors, the impression is that knowledge of the SCE option is very limited, and there is very little done to spread information about it, neither by the cooperative movements nor by the public authorities. It is not known as an alternative, and it is not an issue of debate at this time in Denmark. The recommendation by interviewees has been *better marketing*. One may, though, find information on the SCE as one of the possible company options on the web pages of some business consultancies.

3. Overview of the national cooperative law

Cooperatives in Denmark are in general comprised within general legislation concerning economic and business activity, as is the Act on Financial Statements, the Tax Act, the Act on Competition, and the Act on Bankruptcy. The general rule is that Danish cooperative law is regulated through the by-laws of the companies, cooperative customary practice, and general legal business principles. To get an idea of how cooperative business activity is regulated, one has to look at various acts, guidelines, as well as rules of practice. This report will therefore give an overview of how various types of cooperatives are regulated in relation to specific legislation, in particular with regard to registration, property, and taxation[60]. In the lack of a specific national act on cooperatives, the ICA criteria for cooperatives will be used as a direction. The following types of cooperative organisations exist, distinguishing between commercial and non-commercial cooperatives:

Commercial cooperatives

- Major Producer cooperatives (with a minimum of 10 members, mostly in secondary

[60] Annex A presents a listing of the legislative literature that has been used for the analysis.

agricultural sector, construction and service sector)
- Consumer cooperatives (mostly within food, electricity, heating and water supply)
- Micro producer and Worker cooperatives (with normally less than 10 members mostly in construction and social sector);
- Producer cooperatives in primary agricultural sector (farmers)
- Workers or labour cooperatives
- Financial, Credit, and Insurance cooperatives

Non commercial cooperatives
- Housing cooperatives
- Cooperative associations within other sectors

3.1. Sources and legislation features

A cooperative can be established with a minimum of 2 members (physical and/or juridical persons) and a set of company by-laws/statutes. They should comply with the principle that the surplus/profit of the company is distributed among the members in proportion to their share of the turnover or remain undistributed. Cooperatives with commercial activities have to comply with the general rules of all other commercial undertakings including regulation on registration, bookkeeping, financial statements, auditing, VAT and taxes. Moreover, there is special regulation applying to certain types of cooperatives, especially in the area of taxation. The following sections present the various relevant acts, government executive orders, and "guidelines" for specific types of cooperative activity.

As mentioned, this text is dealing with undertakings that are cooperatives in the understanding used by the International Cooperative Alliance (ICA) broadly speaking[61]. Besides the legislative aspects, there is also what can be called cooperative legal practice and tradition that plays into how cases on approval and registration by DCCA, taxation etc. may be decided, and here is where e.g. the cooperative principles of one-person-one vote and distribution of surplus independent of share in capital, and limited interest on invested capital, applies also in decisions by courts, by DCCA, tax authorities, etc.

Commercial cooperatives are regulated in a law that deals with all those types of undertakings/company that are not regulated by either the Act on Public Limited Liability Companies (A/S), the Act on Private Limited Liability Companies (aps), or the Act on

[61] This is especially relevant, since you cannot reckon that the legal form of a cooperative society also means that you are treated as a cooperative with regards to taxes, nor that you are not treated and functioning as a cooperative even though the legal form may be a private limited liability company (APS). The visibility of the sector is further complicated because there is no national register of cooperatives in Denmark.

Commercial Foundations. This law, called "The Consolidated Act on Certain Commercial Undertaking", covers the following types of undertakings: "Sole traders" (enkeltmandsvirksomhed), partnerships (interessentskaber), limited partnerships (kommanditselskaber), cooperatives (cooperative societies) with limited liability (a.m.b.a.) or with joint and several liability, and other limited liability businesses and societies not covered by the 3 aforementioned acts[62].

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Commercial cooperatives

See LBK no.651; 15/06/2006 (Consolidated Act on Certain Commercial Undertakings); DCCA guidelines on Company with Limited Liability for dissolution.

- Http://www.eogs.dk/s32716.asp;
- Http://www.eogs.dk/sw26100.asp;

Regarding taxation of commercial cooperatives the appropriate act is:

- LBK nr. 1001; 26/10/2009. Selskabsskatteloven (Consolidated Act on Taxation of Companies),
- supplemented with Ligningsvejledningen (Guidelines on Taxation):
- S.A.1.6. Kooperative foreninger (Cooperative associations),
- S.A.1.10 Andre foreninger (Other Associations) and
- S.D.1.11 Fusion af kooperative virksomheder m.v. (Merging of cooperative enterprises etc.)

Today the limited liability cooperative (a.m.b.a.) is the most used form for commercial cooperative company, but there are also cooperative societies with joint and several liability.

3.2.Definition and aim of cooperatives[63]

3.2.1 - General definition and registration

In the Consolidated Act on Certain Commercial Undertakings, the text operates with the following definition for cooperatives that carry out commercial operations, as specified in Part 1,§4:

"… a cooperative (a cooperative society) means an undertaking governed by section §2.1 [unlimited (joint and several) liability] or §2.2 [partially unlimited liability] or by section §3 [limited liability], whose objects are to help promote the common interests of the members

[62] LBK nr.651; 15/6/2006.

[63] As the definition of a cooperative company in praxis in Denmark is best understood taking into account both the act of undertakings, and tax law, this section also deals with the specific tax treatment in relation to cooperatives.

through their participation in the business activities as buyers, suppliers or in any other, similar way, and whose profit, other than normal interest on the paid-up capital, shall either be distributed among the members in proportion to their share of the turnover or remain undistributed in the undertaking".
§2.1 covers undertakings in a partnership where all partners are liable without limitation; §2.2 covers undertakings in a partnership where there are partners with limited as well as partners with unlimited liability. §3 concerns limited liability undertakings which are neither public nor private limited liability companies. After a recent amendment, §3 now specifies that "For the purpose of this Act, a limited liability undertaking means an undertaking in which none of the members are personally and jointly and severally liable without limitation. *It is also a condition that the members of the undertaking cannot vote and receive dividends in proportion to their share of the capital and that there must be access to a varying number of members."* [English version of Act 516 12-06-2009 §2.5]

Amendment is a "codification" of practice from DCCA to clarify the difference between capital based companies governed by the Act of public/private limited liability companies and other companies where voting rights and distribution of surplus is independent of member share in paid-up capital. One reason is that establishment of a public limited liability company requires a minimum capital of Dkr. 300,000 (about 40,000 Euros) and a private limited liability company a minimum capital of (formerly Dkr. 125,000) now Dkr. 80,000 (10-11,000 Euros), whereas no minimum capital requirement exists for undertakings governed by section §3 in the Act on Certain Commercial Undertakings, i.e. with a cooperative structure.
In general, a cooperative can be formed with a minimum of 2 physical or juridical persons and a set of statutes/by-laws. The cooperative must register with the DCCA and with the tax authorities as a commercial company, either in the form of a cooperative with limited liability, or as a cooperative with unlimited personal liability.

Cooperative companies and associations with limited liability are obliged to be named as "Andelsselskab" or "Andelsforening Med Begrænset Ansvar" – A.M.B.A. or F.M.B.A. [section § 6.6].

Undertakings with limited liability, which are not governed by the acts of public or private (capital based) limited liability companies, but by the abovementioned section § 3 and which are not cooperatives in the sense of the Act of Certain Commercial Undertakings section § 4, is named "Selskab Med Begrænset Ansvar" – S.M.B.A.

3.2.2 Definition of cooperatives and tax treatment

As there is no general cooperative law, the definition and praxis of the taxation legislation and authorities is another avenue for defining and understanding the characteristics of Cooperative enterprises in Denmark. The taxation law operates with

these definitions: a cooperative is normally an association, but in order to be taxed as a cooperative, the particular form of organization is not imperative. The important issue is that:

"..the objective of the association is to promote the common business-economic interests. The evaluation of whether an association or a public limited liability company is taxed according to the *cooperative taxation rules*, is done on the basis of what is written in the statutes/bylaws in combination with an evaluation of how the business is actually run in praxis. The exception is the newly established association where only the statutes/bylaws can provide the basis for the evaluation"[64]

In general, commercial cooperatives are taxed at 25% of the taxable income/surplus as are public and private limited liability companies. When fulfilling specific conditions some types of commercial cooperatives can have different kinds of tax benefits.

Major producer cooperatives with a minimum of 10 members

The tax-authorities distinguish various situations of cooperative enterprise: on the one hand **"buying associations"** [indkøbsforeninger]: an association with the purpose of buying, providing, or producing goods or services for the members' consumption in their commercial undertakings, and **"production and sales associations"** [produktions- og salgsforeninger]: members run a business whose products are further elaborated (value added) and sold through the association.

According to LBK no.1001, 26-10-2009 *(Consolidated Act on Taxation of Companies)* sections §1.3, §§14-16A, and §19: can be taxed only at 14,3% of 4 or 6% of a positive balance when fulfilling the following conditions:

(1) a purpose of furthering the common business interest of at least 10 members through the participation of these persons in the activity of the company as buyers, suppliers or in any other, similar way

(2) a turnover with non-members that does not exceed 25% of the total turnover.

(3) and whose profit, other than normal interest on the paid-up capital (normally = to discount rate of Danish National Bank), can be distributed to members as dividend in proportion to their turnover with the company. According to section §14.2 dividend is free of taxation.

Consumer cooperatives

Consumer cooperatives [brugsforeninger] within food supply/groceries mainly (but not exclusively) for consumption in private households do not have to comply with the previous paragraph of having a minimum of 10 members or trading only 25% with non-members and they can also distribute dividends free of taxes to members, to the consumer cooperative movement and to general consumer interests. Any exceeding surplus will be

[64] Translated from SKATs guidelines no. "S.A.1.6.1 Andelsbeskattede andelsselskaber/kooperativer"

taxed at 25%. [LBK no.1001, 26-10-2009 *(Consolidated Act on Taxation of Companies)* sections §1.3a, §9.2-3, and §17)]

Consumer cooperatives within electricity, heating, and water supply open for membership for anybody within a certain supply area are generally free of taxation except income from sale to non-members. [LBK no.1001, 26-10-2009 *(Consolidated Act on Taxation of Companies)* sections §1.2e, 2h, §3.1, and §17]

Micro producer (with less than ten members) and worker cooperatives

If they are not fulfilling the criteria mentioned above, they are taxed at 25% of taxable income/surplus. [LBK no.1001, 26-10-2009 *(Consolidated Act on Taxation of Companies)* sections §1.4 and §17]

Producer or worker cooperatives in primary agriculture sector

These cooperatives constitute a special case. Legislation on ownership in primary agriculture in Denmark is based on the principle of "self-ownership"[65]. This means that the person/family farming the land is also the owner. The farmer can, of course, have employees, but as such, farms are basically one-person or family owned undertakings. Cooperatively owned and managed undertakings in primary agriculture sector however, do exist in Denmark, but it is not a "straight forward" form of ownership. The term "Andelsbrug" (cooperative farm) is not mentioned in the Act. In the act a distinction is made between persons acquiring agricultural property, and "companies" acquiring agricultural companies. The term, "andelsbrug", appears only in the guidelines to the Act. published by the Ministry.

In these guidelines cooperative owning and managing of agricultural land and primary production undertakings in a cooperative form is allowed with an *ownership structure* that, technically, is either personally owned and managed by one person who owns at least 20% of the property and also takes the function of the "anchor person"; or set up as a personal society of the type "interessentskab" or "kommanditselskab" (partnerships and limited partnerships) among physical and not juridical persons, i.e. that there is unlimited or partly unlimited liability among the partners. If the buyers want to function within a scheme with limited liability, the Act allows for forming a private limited liability company or a public limited liability company. A cooperative type ownership with limited liability, that would be according to the ICA principles on voting rights and distribution of dividends independent of share of paid-up capital is not contemplated in this Act. To create such an undertaking, special permission is needed [See §21, no.2 and 4 of Landbrugsloven (*Consolidated Act on Agricultural Property*). LBK no.1202 09-10-2007).

[65] (G.Jakobsen 2006) It is a concept that became a principle for the farmers when the peasants were freed from landlord tenancy in 1787 and the land reforms allowed "self-ownership" to their farms together with the rise of the peasants to political influence with democracy during the last half of the 19th century.

Therefore, the actual existing cooperatively owned and managed agricultural units in Denmark have obtained "special, exceptional" dispensations from the Ministry of Agricultural Affairs to be allowed to make essential deviations from these rules. This implies that they shall not take precedence for future cases. This is the case with among others, the farming labour cooperatives of "Svanholm" and "Landbrugslauget"[66]. Taxation is according to general rules for the chosen type of undertaking.

Law relating to primary farming cooperatives:

- [LBK mr.1202 of 9-10-2007: Bekendtgørelse af lov om landbrugsejendomme". (Act on agricultural property);
- BEK.nr.1028 of 24/10,2008: "Bekendtgørelse om reglerne i lov om landbrugsejendomme". (Executive order on Act on Agricultural Property);
- VEJ nr.37 of 3/6,2005: "Vejledning om reglerne i lov om landbrugsejendomme" (Guidelines on rules in act on agricultural property)]

Workers' or employee-owned cooperatives

These types of cooperatives are not covered legally as a distinctive type of undertaking. Worker or employee-owned, democratically-run undertakings take various legal forms as public (a/s) or private limited liability companies (aps), cooperatives (amba), commercial associations or foundations. Industrial and service cooperatives organised in the national federation, "Kooperationen", were in many cases originally employee-owned, but are now without direct membership of employees[67], instead they are democratically managed based on agreements between employers' and employees' organisations.

Financial, credit and insurance cooperatives

Financial, credit and insurance cooperatives and associations [sparekasser, andelskasser, sammenslutninger af andelskasser og gensidige forsikringsselskaber] are governed by special laws, also tax laws with the effect that they generally have to pay 25% of taxable income.

LBK no.1001, 26-10-2009 *(Consolidated Act on Taxation of Companies)* sections §1.2a, §5, and §17)

Non commercial cooperatives

Cooperative housing associations

A cooperative housing association is a membership association that has ownership of a building containing several dwellings or other physical spaces. Its aim is to provide

[66] www.svanholm.dk and www.landbrugslauget.dk

[67] These companies often have an ownership construction involving a trade union.

housing for its members, by constructing or buying an appropriate building and manage the property according to its purpose. One becomes a member of the association by fulfilling the requirements of the by-laws as a user of the physical building space and acquiring a share of the property, that corresponds to the value of the dwelling (or other physical space) one is going to occupy. The price of the cooperative share is normally related to the square meters occupied, and the estimated value of the house. The buying and selling happens through the board of the association, eventually delegated to an administrative agency, but under the responsibility of the board elected by the members.

There is a specific law on major housing cooperatives, [see LBK nr.960,19/2006] and on taxation of minor housing cooperatives [see S.A.1.10.2 **(**Boligkollektiver)].

The law is applicable for property used for all-year-housing with more than 2 flats; or property with 2 or more independent one-family houses. It does not provide a clear definition beyond that it is an association of members that owns a dwelling. However in this case there are clear indications from the ministry on how model statutes can look, and it pronounces itself on the principles of decision-making, one dwelling-one person-one vote.

A short overview of the chapters of the Act. (LBK nr. 960)

Chapter IA of the Act: On the obligation to inform inhabitants on the condition of the building, and the right to withdraw from participating and remain a tenant, when the process of selling cooperative shares (andele) to the inhabitants is happening and the housing association is created in order to buy and transform a privately owned apartment building into a cooperatively owned one.

Chapter II,§2 – On Cooperative housing association and their acquiring a building from a private owner, and on who can be and have a right to be members of the cooperatives with right to use a certain space of the building.

Chapter II,§5 – On establishing the value of a cooperative share when trading a membership (a cooperative member sells his part to a new member and leaves the use of the flat/space in the building to the new member) - the basic principle is that the value of the share is an amount that cannot surpass the value of the particular share in the total fortune of the house, the value of improvements made to the flat in question, and an estimation of its general condition of maintenance at the time of selling all together.

ChapterII.§6.- on the role of the board of the association in relation to trading of shares/flats of the cooperative association. The board has to approve the transaction and can decrease the price of the share if it is estimated to be above the value of the respective share of the total value of the property. This paragraph also speaks of the obligation to keep and have accounts open for the members; and on the right of the board to settle the percentage of the value of the share that can be used by the member as collateral for loan taking.

Normally a cooperative housing association will be taxed as an association, i.e. free of taxes except if it has income from commercial activities in which case it will be taxed at 25%.

Recent data indicate that there are over 200,000 cooperative housing associations in 2010, of which almost half of these are in the metropolitan area of Copenhagen.[68] Each comprises a number of households (most often in apartment houses) ranging from around 10 dwellings to several hundred in one association.

Small housing cooperatives – "Kollektiver"

Housing cooperatives below a certain size (number of memberships) are however not classified as associations in the sense explained above. This type of housing cooperative is not regulated by a special law, but is treated in the legal sense as "collectively owned property" and not as a housing association. Members of small housing cooperatives can deduct interest on loans in their personal tax bill. During the last 40 years a number of collective housing arrangements have appeared in DK, The so-called **"small housing cooperative"** that typically is a property with at most 3 housing units, and less than 15 members, where new members are accepted through a process of consensus. Economically the members are jointly and severely liable of the debt of the property, and they share in the fortune of the house according to the size of their cooperative share-document. The exact number of cooperatives is not known. The phenomenon which was related to the youth movement of the 1960's grew from about 10 in 1968 to 700 in 1971, reaching 15,000 in 1974, and is still a viable housing alternative[69].

Cooperative associations within other sectors

Non-profit charity associations are often managed in a cooperative way and will normally only be taxed of income from commercial activities after deduction of distributions to charitable non-profit purposes according to the statutes.

[LBK no.1001, 26-10-2009 *(Consolidated Act on Taxation of Companies)* sections §1.6, §3.2-5, and §17]

3.3. Activity

The Danish Commerce and Companies Agency report about 600 cooperative companies registered at the Agency. If one takes the data published from Danmarks

[68] A recent addition to the law has given the housing cooperatives the option to base their yearly calculation of the value of each cooperative share in their association on an estimation made by officially appointed evaluators. So even though there is no national registration for housing cooperatives, this measure has made it possible to make a more realistic estimation of the number of existing cooperative housing associations in Denmark, as it is estimated that about 80% have used this option. Danish Radio-9o'clock-News, 17 June, 2010 and article in Berlingske Tidende Newspaper, Saturday June 26, 2010.

[69] Source: Annette Warming, Institute for History and Society at Roskilde University.

Statistik it gives a different number, about 1200. It is not entirely clear how this difference comes about. Some may be that certain types of cooperatives within the energy sector are not registered here.

As there is no specific law on cooperative enterprise there are very few restrictions on what business activities can be made within this scheme. An example is given in this text on cooperative farming and how it is dealt with legally.

On the other hand, cooperatively organised business activity has not caught on as part of later years labour insertions programs, or provision of social services, as is seen in other European countries, in northern Europe, e.g. Sweden, Finland and the UK. In DK until now, cooperatives still seem mostly associated with agriculture, consumer cooperation and housing, and credit and insurance cooperatives, all related to the old cooperative wave of the social movements from the end of 19th century. This does not mean that there does not exist cooperative structures within the social service sector, but it is not yet an organisational paradigm for solving social service issues in Denmark. For the time being social service enterprises seem to tend to choose rather a foundation construct than a more classical cooperative construct.

Cooperatives can deal with non-members. As explained in the previous section, dealing with non-members can have consequences for the way company tax is calculated, but not for its functioning as a cooperative society within a given sector.

Cooperatives in secondary agricultural sector have developed a practice where a member has the right to and same time is obliged to sell his production to the cooperative. This tradition is mainly within delivery of pork meat, eggs and milk, but not in beef, except from organic farmers. However today you also see producers that create cooperatives within other sectors.

3.4. Forms and modes of setting up

The social-economic activities in DK that lend themselves to cooperative-like organisations may choose legal organisational forms that are not, strictly speaking, cooperatives in the ICA sense, like an APS or partnership, and then through their statutes/by-laws and praxis function in a cooperative way, just as there are enterprises that legally are set up as an AMBA, i.e. a cooperative with limited responsibility and in praxis functions like a capital based company and not as a social enterprise. As expressed in a memorandum on Danish legal practice in cooperative law elaborated for DCCA in 2001:

“Danish proprietary rights are distinguished by a principle of informality under which, unless there are special grounds for determining otherwise, informal agreements are binding. For cooperative societies there is no fixed procedure which must be observed before the society is established, as is the case for public and private companies. It is, however assumed that a foundation procedure which leads to a valid foundation of a

cooperative society must contain those elements which are required before the society can be said to have come into existence. These elements are: a binding decision for foundation or a binding foundation agreement; a set of bye-laws with a content allowing the society to function; a formal management/leadership must be established; as well as a membership lists with at least 2 partners" (natural or legal persons)[70].

Since 1995 Commercial cooperative societies with limited liability must register with the DCCA and present a set of written statutes/by-laws containing some obligatory information for approval. However, as there is a general freedom of contract in Denmark, one is free to regulate the particular circumstances of societies in their statutes/by-laws, unless definitely against law and order. It does not need a special authorization. For acceptance of the registration as a cooperative with DCCA it must comply with 3 conditions: be a cooperative in accordance with the definition of the company act no.651 §4, see subsection 3.2.1, page 12; be a business with the purpose of furthering the economic interests of the members; members/partners have limited liability.

3.5. Membership

Cooperative can be set up with a minimum of 2 members, but to be registered tax-wise as a cooperative and be taxed as such, they need to have a minimum of 10 members. If the member is an association, like for the case of a federation of cooperatives, then the number of members of the primary cooperative count, and the federation can be registered with only 2 associations as members, and still comply with the minimum number of 10.

3.6. Financial profiles

There are no minimum capital requirements in Danish law for forming a cooperative society. The members/part owners normally subscribe for a membership and then do not have a more precisely, specified capital share in the society, although the member is liable for the society's debt[71], often to a limited extent. As already mentioned, this has been the case for workers cooperatives organised in "Kooperationen", and also in the agricultural cooperative sector, although now there is talk about making a specific member-capital-account in some cooperatives.

It is part of the legal definition of a cooperative that its surplus will be distributed to members as dividends according to their activity with the company (and not the size of their paid-up capital), or remain in the company as a commonly owned property; see also

[70] Nielsen, Leif Erland: Dansk Andelsretlig Praksis. DCCA 2001 (quote translated from Danish),
[71] Limited liability can be within a maximum limit as a function of the members' turnover with the society. For the case of the housing cooperatives it is a function of the part paid to become a member/inhabitant of the cooperative.

section 3.2 of this report. Within the farmers' cooperative movement, surplus has in general remained in the cooperative to secure/contribute to technological development and growth of the business. Thus, the equity of agricultural cooperative societies for many years consisted entirely of undistributed surplus, so called "partnership property"[72]. The fact that members do not pay an initial contribution/share when becoming a member of the cooperative also has implied that a leaving member does not get any part of these undistributed surplus reserves.

Cooperatives that operate on the market have to provide financial statements and balance sheets, and deposit them with the DCCA as shall conventional commercial enterprises.

3.7. Organizational profiles

Danish cooperative law recognises the membership democratic basis as one of the significant cooperative principles. The specific structure of a cooperative, organizationally speaking, is very little regulated by law. The general assembly of the members of the cooperative is recognised as the authoritative level, but whether it is with a direct representation, or through representative bodies is, generally speaking, a matter of decision of the particular movement, the decisions of the general assembly, and the statutes. It is not a matter of the legislation. The model of governing bodies and practice adopted in the cooperative i.e. formation of the management body, an elected board/supervisory body, the relative powers attributed to each body etc., are largely determined by the cooperative organisations and the movement themselves. They are decisions at the level of sector, federation, and the national federations and the particular by-laws of the cooperative in question.

With regard to administrative function and administrative competence, cooperative law can make use of the rules in the companies Act. The practice within the farmer based cooperatives has been and is to have a supervisory/elected board made of members and a president/chairman that is working closely with top management of the business part of the cooperative[73]. How it is done in practice varies with the sector and the size of the cooperative. The bigger, nationally comprehensive cooperatives that historically have emerged, partly through mergers of smaller cooperative societies, have often set up a governance system of local managements, both politically in the form of local boards of farmers, and in business terms in the form of local production management. It is an organisational expression of the practice of the close relationship between members and business[74]. In some countries the board also has a representative representing the

[72] DCCA: Memorandum on Danish legal practice in cooperative law in relation. 2001,
[73] Jakobsen,G. 2006 and Bigum (2007)This former CEO of MDFoods, later ArlaFoods until his retirement in 2004, reports in his biography how MDFoods had a tradition of monthly board meetings.
[74] DCCA: Memorandum on Danish legal practice in cooperative law in relation. 2001

members' rights, a kind of internal social auditor[75]. This is not a custom in the Danish cooperative organisations.

The authority of the general assembly and which areas are to be decided upon with a simple majority and which ones demand a 2/3 or 3/4 majority and the presence of a certain percentage of the members are to a large extent a matter of the concrete by-laws of the cooperative.

Issues of minority protection in cooperatives and discrimination are a matter of legal practice. Laws in the area do not exist, but detailed rules on protection of minorities have been developed; likewise for the principle of equality within cooperative societies. According to this principle the majority cannot make decisions which will lead to arbitrary, discriminatory treatment of members.

External audition is required along the same lines as for other companies. It is determined by the law on financial statements and auditing, and it follows the same rules as for conventional companies, which means that it is related to the size of the company and economic turnover.

3.8. Registration and control

Cooperatives with limited liability that are formed after 1995 have to register with DCCA and the tax authorities, when they begin commercial activity. DCCA is the institution that is the authority with regard to matters of dissolution, merging, and splitting, as well as change of homestead. Cooperative societies from before 1995 continue to have full legal status without registering. The change was imposed by the EU.

Statistics on the number of cooperatives registered and functioning in Denmark is not easy to access. Some companies will be part of the companies formally registered as an a.m.b.a., i.e. a cooperative, but taxed as conventional companies with private limited liability (aps), while others will have "aps" as the formal legal form, but may have by-laws and a practice on the distribution of the surplus, and the voting rights which will make them be taxed as cooperatives. So ideally both criteria should be taken into account when identifying cooperative enterprises statistically.

3.9. Transformation and conversion

Transformation and conversion can happen. DCCA is the controlling institution e.g. to secure that respect for minority members' interests is taken into account if a general assembly decision is taken to merge with another company or to transform the company into a publicly traded company.

[75] In Spanish: sindico

The tradition in Danish cooperatives on member capital has been to keep the main surplus in the company which has enabled financing growth and product development, both for consumer cooperatives organised in FDB and farmers' cooperatives.

Many insurance companies and credit and savings cooperatives have converted into public limited liability companies from the late 1980's and onwards.

3.10. Specific tax treatment

This issue is dealt with above in subsection 3.2. As already mentioned, if the cooperative wants to be taxed according to cooperative tax it has to comply with the following economic requirements: the economic benefit can be distributed to members as dividends according to the member's turnover with the cooperative; surplus must otherwise consolidate the company or be dedicated to common social purposes; capital investment can only be granted an interest more or less at the level of the discount rate of the National Bank.

They can collaborate with external investors but may then lose their cooperative taxation and pass to normal company tax. The supplementary texts of the tax authorities show many examples of cooperative companies asking for how the authorities will view changes with regard to memberships, transnational actions, etc. These decisions are taken into account in future decisions for other cooperatives with similar challenges.

3.11. Existing draft proposing new legislation

At this time there does not exist a draft. There is some activity in various circles related to social entrepreneurship and social welfare services about a legislative proposal regarding socio-economic enterprises. However, there is no draft in official circulation at this time (April 2010), nor any political parties that have this in their agenda at present. How such legislation will affect the formation of new cooperatives is unclear at this point. The last time a national act on cooperatives was on the political agenda was in the mid 1980s. It did not prosper.

3.12. Literature and references

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4. The SCE regulation and national law on cooperatives

Comparing the SCE as implemented in national legislation with national cooperatives, as it is currently regulated by national law, the SCE has not influenced Danish legislation. When preparing the SCE Act, the concern was to make the EU-SCE compatible with the Danish legal situation of not regulating cooperative business activity through a national

Act, but as described earlier through a set of rules that take into account custom and practice within the movements. The SCE Regulation and its national implementation has not had an impact on national legislation concerning cooperatives. The SCE Act is not known outside rather specific circles. The first SCE with address in Denmark has yet to be created. The actual cases of internationalisation and collaboration in producers' cooperatives across borders in Denmark have been done within the existing national legislations either as a cooperative according to Danish legislation or by creating public of private limited liability companies. They date back to the late 1990s and 2000.

It is an ongoing issue whether the lack of a general Act on cooperatives is a legal obstacle for further development of cooperatives in Denmark. There have been several attempts to make a law without success.. For the situation of the big commercially strong and established cooperative companies, it has not been, and is not a legal obstacle for its further economic development or internationalization. If you think of the democratic and member-based development, it is interesting to note how strong the issue of the representation of farmers in the boards still is, as well as the one-person-one-vote principle which continues to be very essential in the cooperative agro-industry. The system of representation to the general assembly of the big cooperative companies in agro-industry is based on a one-person-one-vote representation also. On the other hand, lately the farmers' cooperatives have changed their national federative structure. "Danske Andelsselskaber" – the national confederation of farmers' cooperatives in Denmark, ceased to exist about 1 year ago. They are integrated into "Landbrug og Fødevarer" and the members are now affiliated in sectors according to their product Within 'Landbrug and Fødevarer exists a special 'andelssektion' (cooperative section).To some extent this reflects the changed social structure of Danish primary agriculture which had developed towards much bigger differentiation in the size of the farms and increased product specialization and thus also more specialised interests. It is still to be verified how this measure will affect the practice and the relationship between company and members. 'Danske Andelsselskaber' had, through their educational department, LOK[76], for years developed an important function of education and preparation of member-farmers for organisational and strategic work in the boards, besides providing a forum of meeting and debating their common business.. New farmers producer cooperatives have appeared within niche products and within organic dairy products[77].

As regards cooperative development within new sectors for cooperatives, as would be e.g. the social service sector, Danish society appears as an exception in Europe in that there is not a new-cooperative movement to create jobs and support socially excluded as is seen in Southern Europe, and neighbouring countries such as the UK, Sweden and Finland. Some will say that a specific law is lacking for this to happen. Legislation may make the cooperative option more obvious and easier to identify, but it would still be

[76] Landbrugets Oplysnings- og Kursusvirksomhed.
[77] www.thise.dk

necessary that to be known as a viable, democratic alternative for economic collaboration and adapted to concrete social needs both in political circles and among practitioners. Several legal experts within the field are of the opinion that the existing legislation is satisfactory and can easily be adapted to the present social needs of the welfare society, if you wish to create a democratically owned and run enterprise in this area. Compared with countries with a national law, I would say that a difference is that the present Danish legislation does not support or provide for the cooperative principles on education and community development (ICA principles 5 and 7). That is left to the concern of the particular cooperative movements and their by-laws. Danish legislation supports the cooperative principles of economic collaboration, of the remuneration of capital, and a distribution of economic surplus according to members' transactions with the company and for the common good – i.e. it supports and regulates the development of the common enterprise, not for the cooperative to get involved in a broader social development. Such an engagement has to be supported through other motivations.

On the other hand, a case where a specific cooperative legislation most probably makes the difference is "cooperative housing". This cooperative act has been and is, very essential as a legal frame for creating socially affordable housing that is owned and run by the inhabitants, and where the trading of the dwellings is regulated by a cooperative, economic logic and not the logic of the real estate market. If it were not for this legislation, individual interests would most probably conquer over more sociable interests when the dwelling is up for sale and thus rapidly undermine the purpose of the cooperative housing association.

Concluding on the role of the national legal regime and cooperative development in DK, the Act on cooperative housing has clearly been a support for the sustainability of the cooperative housing associations as a member-democratically run affordable housing solution. Otherwise one must say that the legal regime in Denmark has not had a role either as a particular obstacle or as an important factor for development of the cooperative form of enterprise. Historical experience shows rather a pattern of adaptation of the legal regime to the real situation which until now has been dominated by the consumer and the farmer producer cooperative interests.

Therefore, at present there are no specific legal restrictions for the development of cooperatives in Denmark. At the same time there are no political, legal or economic initiatives in support of them.

Appendix: A

Overview of law texts and regulations that have been used in the analysis. They are forwarded in English when possible (see column 3) or in Danish when no translation was available.

Danish abbrev,	**Danish title**	**English title**
LOV 454; 22/05/2006 (SCE-loven)	***Lov om Det europæiske Andelsselskab***	*Act no. 454; May 22, 2006* **The Danish Act on the European Cooperative Society** (the Danish SCE Act) [in English]
LOV 654, 15/06/2006	Lov om Det europæiske selskab	*Act no. 654; June,15,2006.* **The Danish Act on the European company** (Danish SE-act) [in English]
LOV nr. 470, 12/06/2009 (selskabsloven)	Lov om Aktie- og Anpartsselskaber	*Act nr. 470. June 12, 2009* **Act on private and public limited liability companies;** [only Danish]
BEK nr.172, 22/02/2010 (selskabsloven)	Bekendtgørelse nr. 172 af 22. februar 2010 om delvis ikrafttræden af lov om aktieselskaber og anpartsselskaber .	*Announcement no.172 of Feb.22, 2010* on partial **consolidation of Act on public and private limited liability companies** [only Danish]
LBK nr.324, 07/05/2000 (aktieselskabsloven)	Bekendtgørelse af lov om aktieselskaber	*Consolidation Act No. 324 of 7 May 2000* **The Danish Public (limited liability) Companies Consolidation Act)** [in English]
LBK nr.325, 7/05/2000 (anpartselskabsloven)	Bekendtgørelse af lov om anpartsselskaber	*Consolidation Act no.325, May 7, 2000*. (the **Danish Private Limited liability companies Act**) An act to consolidate the private companies Act: Act no. 378, May 22 1996 [in English]
BEK 1525; 13/12/2007 **(**Anmeldelsesbekendtgørelsen)	*Bekendtgørelse om anmeldelse, registrering, gebyr samt offentliggørelse m.v. i Erhvervs- og Selskabsstyrelsen*	Announcement nr. 1525 on registration and publication etc. in DCCM [only Danish]
LBK nr. 648; 15/06/2006 (bogføringsloven)	Bekendtgørelse af ***lov om bogføring***	*Consolidation Act no.648, June15,2006:* **Consolidated Bookkeeping Act.** [in English]
LOV 448; 7/6/2001 (årsregnskabsloven) LBK 395, 25/2/2009	*Lov om erhvervsdrivende virksomheders aflæggelse af årsregnskab. ,*	Danish Act on Commercial Enterprises' presntation of Financial statements etc) [in English]
LBK nr.960, 19/10/2006	*Bekendtgørelse om lov om andelsboligforeninger og*	*Consolidation of Act no. 960 October, 19, 2006* . Act to consolidate Act on

(andelsboligloven)	*andre boligfællesskaber.*	**Cooperative housing associations and collective housing.** [only Danish]
LBK nr, 651; 15/06/2006	"*Bekendtgørelse af lov om visse erhvervsdrivende virksomheder*"	*Consolidation Act no.651, June 15, 2006* **Consolidated Act on Certain Commercial Undertakings** [In English]
LBK nr.1202; 09/10/2007	Bekendtgørelse om *lov om landbrugsejendomme*	*Consolidation Act no. 1202, of Oct.9,2007* on **property of farming units** [only Danish]
BEK nr.1038; 29/10/2008	Bekendtgørelse om *reglerne i lov om landbrugsejendomme*	*Announcement no.. 1038 of 29/10/2008* on the **rules in Act on Agricultural property.** [only Danish[
CIR nr. 9707 af 24/10/2008	Cirkulære om lov om landbrugsejendomme til samtlige landbrugskommissioner	Circular on Act on Agricultural property. [only Danish]
VEJ nr. 37; 03/06/2005	Vejledning om ***reglerne i lov om landbrugsejendomme***	*Guideline no. 37, June, 3, 2005* on **rules in Act on property of farming units** [only Danish]

Guidelines from the Danish Commerce and companies Agency (DCCA) [Vejledninger fra Erhvervs- og selskabsstyrelsen (EogS)] www.eogs.dk		
Http://www.eogs.dk/sw45245.asp	Vejledning om Selskab med begrænset ansvar: hvad gælder for mig.	On how to interpret the law on companies with limited liability – type cooperatives [only Danish]
Http://www.eogs.dk/s32716.asp	Vejledning om opløsning af AMBA, FMBA og AMBA	Guideline for dissolution of cooperative types enterprises [only Danish]
Http://www.eogs.dk/sw26100.asp	Vejledning om genoptagelse af AMBA, FMBA og SMBA	Guidelines for the retake/restart of a previously forced dissolved cooperative type enterprise [only Danish]
Laws on taxation and rules and guidelines from SKAT – (TAX department) (Skattelov og vejledninger vedr. beskatning) www.skat.dk		
LBK nr. 1001; 26/10/2009 (selskabsskatteloven)	Bekendtgørelse om ***lov om indkomstbeskatning i aktieselskaber m.v.***	*Consolidated Act no.1001, Oct.26,2009* on **taxation on public companies** etc.(Share holding companies, etc.) [in English]
S.A.1.10.2 ***Boligkollektiver***	Ligningsvejledning; selskaber og aktionærer 2010-1	Guidelines on **taxation of cooperative housing and collective housing**

		[only Danish]
S.A.1.6.1 ***Andelsbeskattede andelsselskaber***	Ligningsvejledning: Selskaber og aktionærer 2010-1 S.A.1.6 Kooperative foreninger/ *Cooperative associations*	Guidelines on **taxation of cooperatives that are taxed as cooperatives** [only Danish]
S.D.1.11.1 ***Fusion af andelsforeninger og brugsforeninger,*** m.v.	FUL § 12 Ligningsvejledning: Selskaber og aktionærer 2010-1 S.D.1.11 Fusion af kooperative virksomheder m.v./*Merging of cooperative enterprises*	Guidelines for **taxation of merging of cooperative societies/associations and consumer cooperatives** [only Danish]

Appendix: B

Terminology/Technical vocabulary relating to legislation and cooperatives

Danish abbreviation	**Danish**	**English**
Danish-English terminology relating to legislation and cooperative companies		
BEK	Bekendtgørelse	Government announcement relating to Act on.....
CIR	Cirkulære	Circular
LBK	Bekendtgørelse af lov om...	Consolidation of Act on ... *Changes to existing law; passed at the parliament; same level as Act)*
LOV	Lov (bestemt lov vedtaget i Folketinget)	Act (*passed at the parliament and signed by the queen)* *Statute*
VEJ	Vejledning om regler i Lov	Guideline on rules relating to Act no.....
EogS	Erhvervs-og Selskabsstyrelsen; Økonomi- og Erhvervsministeriet www.eogs.dk	DCCA: Danish Commerce and Companies Agency; institution related to the Ministry of Economic and Business Affaires
SKAT	www.skat.dk	National institution that manages the process of taxation.
	http://www.finanstilsynet.dk/	
DK-SCE lov	Kap.1.§1.stk.1; Kap.1,§1.stk.2	Part 1.1-1; Part 1.1-2
EU-SCE Reg.	Artikel	Article

Enterprise terminology and types of enterprises as used in legal documents		
FMBA	Foreninger med begrænset ansvar	Associations with limited liability
	Selskab	Company, society
	Brugsforening	Consumer cooperative
	Andelsbrug	Cooperative agricultural workers' coop.
	Andelsboligforening	Cooperative housing association
	Andelsselskab Andelsforening	Cooperative society Cooperative association
AMBA	Andelsselskab med begrænset ansvar	Cooperative with limited liability
K/S	Kommanditselskab	Limited partnership: “The general members” 1 or more members are joint and several liable. “the limited partners” have limited liability. I
	Kooperativ virksomhed	A worker cooperative affiliated to ‘Kooperationen’ the worker cooperative national federation
I/S	Interessentskab	Partnership: a private unlimited liability company (personal and jointly liable for debt and obligations)
APS	Anpartsselskaber	Private limited liability company
A/S	Aktieselskaber	Public limited liability company
SMBA	Selskaber med begrænset ansvar	Societies with limited liability
	Virksomhed	Undertaking, company
Other relevant vocabulary for legal documents		
	Beslutninger, afgørelser	Decisions
	Direktiver	Directives
	Forordninger	Regulations
	Fællesskabsret	Community law
	Gældende lovgivning	Legislation in force
	Lov (jura)	Statute
	Lov i betydning lovgivning	Law, laws, meaning legislation
	Lov i betydning retssystem	Law; meaning system of laws
	Lovforslag	Bill
	Retsforeskrifter	Community legislation in force
	Rådets Direktiv	Council Directive
	Rådets Forordning	Council Regulation

	Selskabsret	Company law
	Solidarisk hæftelse	Joint and variable liability
	Tegnet kapital	Subscribed capital
	Vedtægter	Rules (for association), regulations (for organisation) or by-laws (us-terminology),
	Forberedende arbejde	Preparatory act.
	Ligning	The process of taxation by the authorities on the basis on the tax declarations etc.
	Ligningsvejledning	Guidelines on how to estimate and tax income, fortune, property of people and enterprises ,
	Lovsamling, kodeks, lovbog	Code
	Retspraksis	Case law

ESTONIA

By Marit Otsing

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Estonian legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies, as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Estonian legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives. – **5.** Visibility of the cooperative sector and other related issues.

1. The implementation of SCE Regulation 1435/2003 in Estonian legislation

The SCE Regulation 1435/2003 is implemented in Estonia by "Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) Implementation Act".

1.1. Source, time and modes of implementation

SCE Regulation has been implemented in Estonia through a special law. "Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) Implementation Act" was passed by the Parliament on Dec 14, 2005 and was announced by the decision No 959 (December 21, 2005) of the President of Estonia.

1.2. Structure and main contents of the regulation

The legal act which regulates implementation of SCE Regulation in Estonia, is concise.

The Act regulates the legal status of an European public limited company (SCE) within the territory of Estonia insofar as this is not regulated by Council Regulation (EC) No 1435/2003 on the Statute for a European company (SCE) (OJ L 207, 18.08.2003, pp 1–24).

The Act and other national legal acts apply to an SCE if pursuant to the Regulation provisions of national law apply or if the Regulation permits application of national law to certain areas. (http://www.just.ee/23295)

The Act has 6 chapters which regulate the following topics:

- General provisions
- Transfer of Registered Office of SCE
- Formation of SCE
- SCE Organs
- Dissolutions
- Implementing Provisions

The Act does not contain any specific measures for enabling or facilitating the formation of SCEs. Neither does it have any strict regulative rules or restrictions which could limit the free exercise of certain activities to be carried out by the SCE.

It gives a regulation for the formation of SCEs by merger and by conversion of existing commercial association in SCE.

Quotation from the Act:

Division 1, Formation of SCE by merger, regulates the following topics:

§ 7. Consent of Tax and Customs Board in case of formation of SCE by merger

(1) If a commercial association registered with the Estonian commercial register which is wound up as a result of the formation of the SCE in a foreign state participates in the formation of the SCE by way of merger, the registrar shall not issue the certificate provided for in Article 29(2) of the Regulation without the consent of regional structural unit of the Tax and Customs Board.

(2) In order to obtain consent, the registrar shall submit a written request to the Tax and Customs Board.

(3) The Tax and Customs Board may not refuse to grant consent if it does not have any claims against the SCE, also, if the Tax and Customs Board deems it probable that no violation of tax law is established in the course of the inspection procedure conducted by a tax authority at the time of the request for the consent.

(4) If consent is not received within twenty days after sending the request, the Tax and Customs Board shall be deemed to agree to formation of the SCE by way of merger.

Division 2, conversion of existing commercial association in SCE regulates the following topics:

§ 9. Publication of draft terms of conversion

At least one month before the general meeting deciding on the conversion of existing public limited company in SCE, the management board shall submit the draft terms of conversion to the registrar of the commercial register and shall publish a notice concerning the drawing up of the draft terms of conversion in the publication *Ametlikud Teadaanded*. The notice shall set out that the draft terms of conversion are available for examination in the registration department and in a place designated by the management board.

1.3. The designated Authority/ies, as required by art. 78, par. 2, SCE Reg.

The designated Authority of the SCE Regulation is the Court and its Registration Departments in Estonia (http://www.kohus.ee).

Quotation from the Act:

> § 2. Entry of SCE in commercial register
> An SCE is entered in the commercial register pursuant to the provisions of the Commercial Code concerning entry of a public limited company in the commercial register.
> § 3. Competence
> (1) The obligation provided for in Article 7(8) of the Regulation shall be performed by the registrar in whose jurisdiction the existing registered office of the SCE is located.
> (2) The obligation provided for in Article 29(2) of the Regulation shall be performed by the registrar in whose jurisdiction the registered office of the merging commercial association or commercial association being acquired is located.
> (3) The obligations provided for in Article 30 of the Regulation shall be performed by the registrar in whose jurisdiction the registered office of the company being acquired or the SCE formed in the course of the merger is located.
> (4) The obligation specified in Article 73(5) of the Regulation shall be performed by the court who established the infringement provided for in Article 6 of the Regulation

1.4. Essential bibliography

- http://www.kohus.ee, Information about Estonian court system
- http://www.just.ee/23295, Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) Implementation Act.

2. A comment on the implementation of the SCE Regulation in Estonian legislation

For describing the current stage of implementation of the SCE Regulation Estonia today five interviees were implemented. The interviewees are the best experts in cooperative sector who were choosed for the research because of their wide knowledge in the legislative, economic and social aspects of cooperatives.

The choice of interviwees was made following the principle of covering the whole area of different kind of cooperatives in Estonia. Therefore the leaders (in one case a former

leader) of the 4 bigger cooperative organisations were interviewed. The sectoral organisations represent housing, credit and worker cooperatives.

One of the interviewees is professor teaching cooperative studies at the University of Life Sciences which is the only academic institution in Estonia which gives BA, MA and PhD level education on cooperative studies. It was decided that it is important to include the know-how from academic cooperative sector to the research.

The interviewees have been:

- Urmas Mardi, board member of Estonian Union of Cooperative Housing Associations (EKL)

- Andres Jaadla, board member of Estonian Union of Worker Cooperatives, Participative Enterprises and Social Economy Organisations (Estcoop)
- Andrus Ristkok, chairman of Estonian Union of Credit Cooperatives
- Jaan Leetsaar, professor of cooperative studies, Estonian Univesity of Life Sciences
- Valdek Kraus, consultant of cooperatives, Saaremaa Educational Centre, former chaiman of the council of Estonian Cooperative Association

It is considerable, that all the interviewees, who are the best experts on cooperatives, did not know the main aims and content of SCE Regulation. This gives a clear sign that the SCE Regulation is not known among the Estonian cooperators, public and civil cervants.

The SCE Regulation is not known among the Estonian co-operators, among the public and among the civil servants.

The main reason for that is that cooperative movement is not very strong in Estonia. It is supported by the state neither ideologically nor financially and legally.

Another reason why there has not been created a single SCE is the lack of informative work which should have been done by the state authorities.

3. Overview of national cooperative law

3.1. Sources and legislation features

In Estonia there are legislative acts for most types of cooperatives, covering the special areas for housing and crediting. Special legal acts are also for commercial cooperatives and/or associations and non-profit organisations. Legal acts which regulate the area of cooperatives are:

- Apartment Associations Act
- Building Associations Act
- Commercial Associations Act
- Non-profit Associations Act
- Savings and Loan Associations Act

It is rather complicated to explain the content and legal details of different kinds of cooperatives in Estonia because of the hardships concerning translation of the terms.

In Estonia the word "ühistu" means cooperative, according to the meaning defined by ICA. The word "ühing" means association according to the common understanding about a non-profit association. In Estonian language laenu- hoiu**ühistu** is legally translated savings and loan **association.** Hoon**eühistu** is legally translated building **association.** Korteri**ühistu** is legally translated apartment **association.** Tulundus**ühistu** is legally translated commercial **association.** Mittetulundus**ühing** is legally translated non-profit **association.**

Today it is hard to define why official terms in legal acts were translated in a way which does not describe their real content in a way which is understandable on international level. The most probable reason is that the officials at the Ministry of Justice who have been responsible for the translation were not aware about the content of cooperative movement and did not know that the words "cooperative" and "association" can have very different meanings.

Up to the year 2001 the activities of cooperatives in Estonia were regulated by the Cooperative Act. In 2001 the changes in this act were passed and the act was renamed. The new name was Commercial Associations Act (Otsing, 2005). This was a principal change in the development of cooperative sector in Estonia.

Firstly, the definition of a "cooperative" as it is known internationally (definition by International Cooperative Alliance)-*A co-operative is 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 (www.ica.coop).* - was dramatically restructured. One of the most fatal changes was the fact that the word "cooperative" was not used in Estonian legal acts any more. Instead of a word "cooperative" the word "association" was started to use in legal acts.

Another major change was that instead of one legal act coordinating all cooperatives in Estonia, the different types of cooperatives started to be coordinated by two major laws - 1) Commercial Associations Act and 2) Non-profit Associations Act.

Commercial Associations Act regulates the activities of commercial associations, savings and loan associations and building associations. The two latter types have respective legal acts which regulate their activities (1) Savings and Loan Associations Act and 2) Building Associations Act).

Non-profit Associations Act regulates the activities of non-profit associations and apartment associations. There is also a separate act for regulating the activities of apartment associations (Apartment Associations Act).

As seen from above the Estonian legal acts make difference between commercial associations (including also savings and loan associations and building associations), which are in principal acting as cooperatives, following the rules and values of International Cooperative Alliance.

Simultaneously, the non-profit associations are acting as citizens' organisations. A citizens' association is a voluntary organisation of natural persons, formed as a manifestation of their initiative. This definition is often used as general term for non-profit associations and civil law partnerships. (Koncz, K. Ed, 2005)

It is important to notice that apartment associations form a different group among all Estonian non-profit organisations. It is evident that an ordinary non-profit or sports club is not formed for economic activities .But in the case of apartment association it is vice versa. Apartment association is an economic organisation as other housing management companies. An apartment association is taking care of the management of the building, it is collecting financial reserves, hires employees etc (Petsi, 2004).

At the same time apartment associations are the most numerous form of cooperatives in Estonia. Today there are 9430 apartment associations in Estonia, 14 savings and loan associations and 446 commercial associations. Today apartment associations act as typical cooperatives following the principles of ICA but according to the legislation they are non-profit organisations.

As the above mentioned details concerning legislative differences in Estonia are mostly important for Estonian apartment associations and not for the possible wider audience of this report, we will not reflect the organisational details of the apartment associations in this report and we will give more information about the commercial associations.

3.2. Definition and aim of cooperatives

Hereby the definitions about cooperatives/associations are defined according to the main legislative act which coordinates the field of cooperatives/associations. This is Commercial Associations Act.

Commercial Associations Act defines an association in the following manner:

> Commercial Association is a company the purpose of which is to support and promote the economic interests of its members through joint economic activity in which the members participate:
> 1) as consumers or users of other benefits;
> 2) as suppliers;
> 3) through work contribution;
> 4) through the use of services;
> 5) in any other similar manner.

For clarification of the difference between commercial associations and non-profit associations the definition of non-profit association is provided hereby.

Non-profit Associations Act defines an association in the following manner:

> A non-profit association is a voluntary association of persons the objective or main activity of which shall not be the earning of income from economic activity.

3.3. Activity

According to the Commercial Associations Act the cooperative enterprises have the rights and obligations as other types of enterprises which are coordinated by the Commercial Code. There are no specific rules and/or restrictions related to the free exercise of certain activities. There are no obligations or restrictions for dealing with the non-members.

There are some restrictions which concern the specific types of cooperative enterprises. For example, the Savings and Loan Associations Act enacts that it is possible to start a savings and loan association only by the members who are registered in neighbouring counties, having therefore a territorial restriction.

The Non-profit Associations Act enacts that the income of a non-profit association may be used only to achieve the objectives specified in its articles of association. A non-profit association shall not distribute profits among its members.

3.4. Forms and modes of setting up

The forms and modes of setting up a commercial association are similar to the regulations which are applicable for setting up a commercial enterprise.

Quotation from the Act :

> § 4. Founder of association
>
> (1) An association may be founded by at least five persons. A founder may be a natural person or a legal person.
>
> (2) The number of founders of an association may be smaller than provided for in subsection (1) of this section, if at least three of them are associations.
>
> § 5. Memorandum of association
>
> (1) In order to found an association, the founders shall enter into a memorandum of association.

3.5. Membership

The minimum number of members for setting up a commercial association is two. There are no specific rules which enact the circumstances for investor members. New members are admissed by the board.

Quotation from the Commercial Associations Act:

§ 11. Requirements for membership of association

(1) A natural person or a legal person may become a member of an association.

(3) The articles of association may prescribe conditions which the members must comply with. The conditions established for the members by the articles of association shall be reasonable.

(4) Obligations may be imposed on members only pursuant to the procedure provided for in the articles of association.

§ 24. Transfer of membership

A member of an association may transfer the membership of the member to another person who becomes a member of the association after a resolution on the membership of such person is adopted pursuant to the procedure provided for in § 13 of this Act. If acceptance is refused, the person who wished to transfer membership shall remain a member of the association.

§ 13. Resolution on acceptance into membership and acceptance into membership

(1) The management board shall review a person's application unless such right is granted to the general meeting or supervisory board in the articles of association.

§1 (4) A state cannot be a member of the association.

3.6. Financial profiles

The Commercial Associations Act describes the principles for the financial profiles of the commercial associations. The details have been left for enacting in the articles of the commercial association.

Quotation from the Commercial Associations Act:

§1 (2) An association shall be liable for its obligations with all of its assets. A member of an association shall not be personally liable for the obligations of the association. The articles of association may prescribe that the members are solidarily liable for the obligations of the association with all of their assets (full personal liability) or are liable to the extent determined by the articles of association (additional liability).

(3) Unless the articles of association prescribe the personal liability of the members of the association for the obligations of the association, the share of the association capital shall be at least 40 000 kroons.[78] If the articles of association prescribe the additional liability of the members of the association, the amount of additional liability of the members shall be at least 40 000 kroons.

§ 29. Distribution of profit

(1) The net profit of an association shall be transferred to the reserves which are not subject to distribution between the members of the association.

(2) The articles of association may prescribe that payments are made to the members of the association from net profit or from profit of the previous financial year from which uncovered losses of previous years have been deducted.

§ 30. Amount and payment of dividends

(1) The amount of a dividend shall be approved by the general meeting. The management board or, if a supervisory board exists, the supervisory board shall make a proposal on the amount of a dividend. The general meeting shall not decide on payment of a dividend which is greater than prescribed in the proposal of the management board or supervisory board.

(2) If, according to the articles of association, dividends must be paid to the members, a share of profit (dividend) shall be paid to the members of the association according to their participation in the activities of the association.

(3) The articles of association may prescribe that a dividend is paid to a member in an amount in proportion to the contribution of the member. Such dividend shall not be greater than the dividend paid to the member according to the participation of the member in the activities of the association or an interest calculated on the basis of an ordinary long-term deposit.

§ 31. Legal reserve

(1) An association shall have a legal reserve. A legal reserve shall be formed from annual net profit transfers and other transfers entered in the legal reserve pursuant to law or the articles of association.

(2) If, according to the articles of association, dividends may be paid from profit, at least one-twentieth of the net profit shall be entered in the legal reserve during each financial year, unless the articles of association prescribe a greater transfer.

(3) Upon a resolution of the general meeting, legal reserve may be used to cover loss if it is impossible to cover the loss from undistributed profits from previous periods.

§ 32. Other reserves

The articles of association may prescribe that, in addition to the legal reserve, other reserves are formed from which payments to the members shall not be made. The articles of association shall determine the procedure for and purpose of use of such reserves.

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3.7. Organisational profiles

The general meeting is the highest body of the association.

Quotation from the Commercial Associations Act:

500

§ 43. Right to vote

Each member of an association has one vote.

§ 44. Restriction of right to vote

A member of an association shall not vote if release of the member from obligations or liabilities, assertion of a claim against the member or entry into of a transaction between the member and the association, or appointment of a representative of the association in such transaction or exclusion of the member from the association, is being decided. The votes of such member shall not be taken into account in the determination of representation.

§ 55. Board

(2) The management board may have one member (director) or several members. The number of members of the management board shall be determined in the articles of association. A member of the management board need not be a member of the association. A member of the management board must be a natural person with active legal capacity. The residence of at least one-half of the members of the management board must be in Estonia.

§ 62. Prohibition on competition

(1) Without the consent of the general meeting or, if a supervisory board exists, without the consent of the supervisory board, a member of the management board shall not:

1) be a sole proprietor in the area of activity of the association;

2) be a partner of a general partnership or a general partner of a limited partnership which operates in the area of activity of the association;

3) be a member of a directing body of a company which operates in the area of activity of the association, except if the companies belong to one group.

§ 64. Supervisory board

(1) An association shall have a supervisory board if the association has more than 200 members or the share capital is greater than 400 000 kroons or if so prescribed by the articles of association.

§ 65. Auditors and controllers

(1) An association shall have an auditor if the share capital of the association is greater than 400 000 kroons or if so prescribed by law or the articles of association.

(2) If an association does not have an auditor, the general meeting shall elect one or several controllers in order to audit the economic activities of the association.

3.8. Registration and control

The Commercial Associations Act regulates the conditions of registration of a commercial association.

Quotation from the Commercial Associations Act:

§ 7. Petition for entry in commercial register

(1) In order to enter an association in the commercial register, the management board shall submit a petition to the commercial register and the petition shall set out all the information specified in § 8 of this Act. The petition shall be signed by all members of the management board.

(2) Any other petition submitted to the commercial register shall be signed by a member of the management board. If the members of the management board have the right to represent the association only jointly, all the members of the management board entitled to represent the association jointly shall sign the petition. Signatures on the petition shall be notarially authenticated.

(3) The management board is required to submit a petition for entry in the commercial register within six months as of entry into the memorandum of association.

§ 66. Appointment and duties of auditors

(1) The number of auditors shall be specified and auditors shall be appointed by the general meeting, which shall also specify the procedure for remuneration of auditors. The written consent of a person is required for appointment of the person as auditor.

(2) Persons to whom the right to be an auditor is granted pursuant to law may be auditors.

(3) The management board shall submit a list of auditors to the commercial register, which shall set out the names, personal identification codes and residences of the auditors, and the legal basis for their activities as auditors. Upon a change of auditors, the management board shall, within five days, submit a new list of auditors to the commercial register. The consent of auditors specified in subsection (1) of this section shall be appended to a list of auditors submitted to the commercial register.

(6) In addition to auditing, an auditor shall monitor the management of an association and the correctness of maintaining a list of members and shall provide his or her opinion thereon.

§ 67. Appointment of controller

(1) The number of controllers shall be specified and controllers shall be appointed by the general meeting, which shall also specify the procedure for remuneration of controllers. The written consent of a person is required for appointment of the person as controller.

(2) The management board shall submit a list of controllers to the commercial register; the list shall set out the names, personal identification codes and residences of the

controllers. Upon a change of controllers, the management board shall, within five days, submit a new list of controllers to the commercial register. The consent of controllers specified in subsection (1) of this section shall be appended to a list of controllers submitted to the commercial register.

(3) A natural person with active legal capacity who has sufficient economic and legal knowledge may be a controller. A member of the association, a member of the management board or supervisory board of an association, a bankrupt or any other person from whom the right to engage in economic activity has been taken away pursuant to law shall not be a controller.

(4) A controller may be appointed for one financial year or for a longer term, but for not longer than three years.

§ 69. Controller's report

(1) A controller shall prepare a report on the results of auditing and shall submit such report to the general meeting.

(2) The supervisory board and, if the association does not have a supervisory board, the general meeting shall be informed of each error in management, or violation of the requirements of the articles of association or law discovered by a controller. The general meeting shall be informed of errors in management made by the supervisory board, or violation of the requirements of the articles of association or law by the supervisory board.

3.9. Transformation and conversion

The Commercial Associations Act does not enact any rules for transformation or conversion of commercial associations into different legal form of enterprises.

3.10. Specific tax treatment

The standard treatment for enterprises is applied for tax treatment of commercial associations.

3.11. Existing draft proposing new legislation.

The Union of Savings and Loan Associations has prepared proposals for amendments in Savings and Loan Association Act. The main aim of the amendments is to lose the territorial restrictions from the Act. Also some minor proposals for supporting the everyday activities of these associations were prepared. The proposals have been given to the Parliament.

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4. The SCE Regulation and national law on cooperatives

In order to describe the main legal obstacles to the development of cooperatives in Estonia, a brief overview of the latest history of cooperative movement should be given.

In the end of the 1980-ies, along with the starting of the “perestroika”, began formation of new cooperatives in Estonia. At that time it was the first and only possible form of private enterprise. By the beginning of 1990 there were already 2000 such new cooperatives registered in Estonia. By August, 1993, this number reached 3000.

At the same time started the process of enterprise privatisation. If in 1991 more than 90 % of enterprises in the service and trade sectors belonged to the state or the local authorities, then in 1994 the percentage of privately owned enterprises in the service sector reached 83 % and in the trade sector – 90 %.

The society developed in the direction of decreasing of the number of large employee-owned enterprises and simultaneous growth of firms with external participation and management-owned firms.

The number of employee ownership or participative enterprises, initiated in the beginning of the 1990-ies, was on the decrease during the 1990s, these enterprises then taking other shapes. The main reason for this change of shape is the inadequate understanding of the participants about the rules of a free market economy. The employees that became part-owners of their enterprises in the beginning of the 1990-ies preferred to exchange their shares for money.

The process of privatisation and founding of new enterprises was just the beginning of the development of new structures of ownership.

Housing reform in Estonia began in 1992; since then 98% of the all apartments have been privatised and 75 % of population now lives in apartment buildings. The reform has moved through three stages:

1. privatisation of apartments
2. establishment of apartment associations
3. privatisation of the land for apartment associations (Otsing, 2004)

Today there are 9430 apartment and building associations in Estonia. Apartment and building associations form a remarkable percentage of all the non-profit organisations in Estonia.

The national housing policy strategy was approved in 2003. A few local governments have approved their local housing strategies. Since 1991 (after the collapse of the communist regime), the housing sector has mostly been regulated by free market relations, whereas the public sector provides a regulatory framework for changes (Paadam, 2004).

The constitution of Estonia does not directly stipulate everyone's right to housing. The right to housing (right to state assistance in case of need) is realised through mechanisms set in place under the Social Welfare Act (Kährik, 2006).

In 2001 the Act of Co-operatives was remade and the new legal act was named - Commercial Associations Act. The new act rised the founding capital of a commercial association and series of other changes were made which made founding and running a commercial association less attractive. After that change the decrease in the amount of commercial cooperatives grew rapidly.

According to the information from the Commercial Register there were registered 15 022 non-profit organisations and 411 foundations in August 2001 in Estonia (Lagerspetz, Trummal, 2003). At the same time there were ca 3000 cooperatives (Otsing, 2003)

Today there are 446 commercial associations and 29 237 non-profit associations and foundations according to the Commercial Register.

Generally, the official policies in Estonia have not been in favour of co-operative movement.

The main reason why the development of cooperatives in Estonia has been in downfall is the lack of supportive policy and lack of information about the cooperatives.

I seems, that major part of the politicians from younger generation do not know the international principles of cooperative movement. Quite often cooperative movement and cooperatives are seen as a relict of the soviet period or as economic organisations of a small interest groups. But this is a principal mistake (Leetsar, 2003)

The leaders of educational system have not done practically anything for inserting cooperative sciences into curriculum. In 2001, the basis of cooperative entrepreneurship were not taught in Estonian colleges, gymnasiums and in most of the universities. The word "cooperative" was totally absent from the textbooks of economy and civil society in our gymnasiums (Leetsar, 2003).

The practice of other states in the world shows that the development of cooperatives has to be guided by legislation, financial principles and public publicity. Estonian intellectuals should gain knowledge about the methods how to preserve and develop small nations with the help of cooperative movement (Leetsar, 2003).

Consequently, it could be said that the SCE model is unknown in Estonia and the amount of commercial cooperatives is decreasing. The legal acts do not make any restrictions to the activities of commercial associations, but at the same time there are no any supportive structures or measures implemented.

5. Visibility of the cooperative sector and other related issues

Cooperative sector in Estonia is not visible. Cooperative sector should gain much bigger public support for promotion of the idea of a cooperative as a sustainable and effective model of entrepreneurship.

FINLAND

By Pekka Pättiniemi, Jarmo Hänninen

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Finnish legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the national regulation on SCE. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Finnish legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Finnish legislation

1.1. Source, time and modes of implementation

SCE Regulation 1435/2003 has been implemented in Finland by Law No 906 of October 29th 2006 (Eurooppaosuuskuntalaki 29.10.2006/906). This law came into force November 1st 2006.

Simultaneously, changes were made in Cooperative Act, Trade Register Act, Business Information Act, Trade Name Act, Business Mortgage Act, Act on Credit Institutions, and Cooperative Bank Act. These changes both added SCE in them and also brought the contents of SCE Regulation in these acts. The change made to Cooperative Act is an exception, it does not concern even options but it is connected to SCE Regulation art. 46, par. 1. In Finland a legal person cannot be a member e.g. in a management organ, but this was not written in legislation. Now this was added to Cooperative Act as it was done in Limited Liability Companies Act 624/2006 a few months earlier. This clears the implementation of SCE Reg. art. 46, par. 1.

1.2. Structure and main contents of the regulation

Structure

The Finnish implementation of SCE Regulation is concise but also quite thorough. The main part is the SCE Act 906/2006, which consists of the main contents of SCE Regulations and has multiple implications to Finnish Cooperatives Act and other acts

concerning e.g. registration issues. SCE Act has only 16 sections, which handle registration, formation, conversion and seat (also final accounts connected) issues, member's special right to resign, management and general meeting, liquidation and dissolution, and also liability and penal provision issues. These sections follow strictly the SCE Regulation and give a clear picture of its main contents.

Options

Some options given in the SCE Regulation are exercised. These concern participation in the formation of an SCE; additional form of publication for the transfer of the registered office; requirements for the protection of the interests of creditors and holders of other rights in case of transfer; extending the application of art. 7, par. 7, subpar. 1, to liabilities that arise, or may arise, prior to the transfer; ensure appropriate protection for members who have opposed the merger; providing for the responsibility of the managing director; requiring or permitting an SCE statutes to provide for the appointment and removal of the members of the management organ by the general meeting; providing for the responsibility of the managing director, and; providing for the enlargement of statutes' capacity to regulate the power of representation.

It is necessary to mention that none of these options is implemented straight in the Finnish SCE Act, without any implications to national legislation or SCE Regulation. All options exercised have implications to national legislation, mainly to Cooperative Act and Limited Liability Companies Act, or to SCE Regulation, or simultaneously to both. It has to be mentioned also, that when exercising options there is only one implication to the valid national legislation which was changed simultaneously when national SCE Act was given. As stated earlier, there was also one change made to Cooperative Act but this was not connected to options.

There are also many stipulations in the Finnish Cooperative Act that are in line with SCE Reg. options, but in the national SCE Act there are no implications to these. They were already given before in national legislation, again without any connection to upcoming SCE Regulation. The question is, should we regard them as exercising the options? Technically they don't seem perfectly like that but in practice they implement the possibilities of options.

As both one-tier and two-tier systems were already taken into account in the Cooperative Act, this helped the implementation of SCE Regulation and options connected to these didn't have to be used (e.g. SCE Reg. art. 42, par. 4).

Application of regulation

Finnish SCE Act enables the formation of SCE's. But as also earlier national legislation, e.g. Cooperatives Act, give good opportunities for cross-border actions, the SCE option doesn't accelerate formation of European joint ventures.

Implications

The implications made to other acts can be divided into two categories: organisational implications to Cooperative Act, and implications to mainly supervision and authority legislation. The former give the implementation an organisational and functional framework as a cooperative according to Finnish Cooperatives Act. The latter point out the different authorities required by SCE Regulation. Naturally, there are also implications for the SCE Regulation. These guarantee that the national legislation meets the requirements of the SCE Regulation.

Here is a good example how the implications are made Finnish SCE Act both to national legislation and SCE Regulation:

"2 § Registration

The National Board of Patents and Registration is the legal authority concerning registration of an SCE and the issue named in SCE Regulation art. 26 para. 2.

Announcing an SCE to register and the trade name are regulated in the SCE Regulation, the Co-operatives Act, the Limited Liability Companies Act, the Trade Register Act (129/1979), the Business Information Act (244/2001) and the Trade Name Act (128/1979)."

Rules and restrictions

There are no specific rules and/or operational, territorial or other restrictions, obligations or obstacles related to the nature of business or to the free exercise of certain activities to be carried out by the SCE. SCEs can participate public procurements and are free to exercise any kind of appropriate business. Finnish Cooperative Act has no such restrictions, either.

1.3. The designated Authority/ies as provided for by article 78, par. 2, SCE Reg.

Paragraphs 7, 21, 29 and 30:

The National Board of Patents and Registration is the legal authority concerning registration issues.

Paragraph 54:

The state provincial office is the authority to process the application concerning convening of the general co-operative meeting, when the meeting to be held according to SCE Regulation is not convened in stipulated time.

Paragraph 73:

The court is legal authority in issues mentioned in SCE Regulation art. 73 para. 1-4. If the SCE to be wound-up is to be supervised under the Act on Financial Supervision (878/2008), e.g. bank, the authority is the Financial Supervisory Authority (FIN-FSA).

1.4. Essential bibliography

Eurooppaosuuskuntalaki, Pellervo-Seura ry, Helsinki 2007 (SCE Act, Pellervo Confederation of Finnish Cooperatives, Helsinki 2007)

Eurooppaosuuskuntalaki 906/2006 (SCE Act 906/2006, main parts delivered in English)

Interview for the SCE Project questionnaire with Mr. Sami Karhu, Director of Cooperative Services and Mr. Kari Lehto, General Councel, Legal Services, Pellervo Confederation of Finnish Cooperatives, 18th December 2009

2. A comment on the implementation of the SCE Regulation in Finnish legislation

Implementation

Finnish implementation of SCE Regulation itself is done very well. The process was transparent and implemented in open collaboration with cooperative movement. Also the development of SCE Act and outcome were informed widely to cooperative sector. As stated earlier, the structure of Finnish implementation of SCE Regulation is clear and easy to apply. The Finnish SCE Act follows strictly the SCE Regulation, and Cooperative Act gives firm organisational framework for SCEs. Authority issues are solved simply by allocating different duties to Finnish authorities. Naturally, there are always some issues that are not quite clear in practice, like taxation of cross-border actions, but the legal and organisational framework for creating SCEs is very good.

Expectations and results

In spite of clear implementation and appropriate information there are no SCEs established in Finland. There is only one subsidiary in Finland. These poor results were not a surprise; during the development process of SCE Act there were lots of doubts that the act would be widely adopted, even if at all. These doubts were based on e.g. the fact that Finnish Cooperative Act allows foreign membership, and it is even possible for foreigners to establish a cooperative in Finland. When the Finnish SCE Act was given, there was also debate about other European legislation amendment ideas, such as enabling transfer of company seat to another member state.

It seems that there has been no particular need for SCEs. The solutions of cross-border activities have been done by buying company shares or establishing subsidiaries. Many structural changes in the markets related with cooperatives, such as dairy and meat business, have already been done earlier, and now there are situations that different national cooperatives are competitors. In e.g. dairy business there are some Finnish dairy cooperatives that that have collaboration in marketing with Swedish Arla through Arla's ownership in former Finnish Ingman Foods, now Arla-Ingman. It must be stated also, that there has been only one SE in Finland.

3. Overview of national cooperative law

3.1. Sources and legislation features

In Finland cooperatives are regulated by Cooperative Act, and cooperative banking sector by Cooperative Bank Act. Cooperative banks are cooperatives, and the Cooperative Act is applied unless there are special issues mentioned in Cooperative Bank Act.

Tax and e.g. registration legislation is general for all enterprises, and covers also cooperatives.

3.2. Definition and aim of cooperatives

Cooperative Act, Chapter 1, Section 2 - Definition and purpose of a cooperative:

"(1) 'Co-operative' is defined as an organisation whose membership and share capital have not been determined in advance. The purpose of a co-operative shall be to promote the economic and business interests of its members by way of the pursuit of economic activity where the members make use of the services provided by the co-operative or services that the co-operative arranges through a subsidiary or otherwise.

(2) However, it may be stipulated in the rules of the co-operative that its main purpose is the common achievement of a ideological goal."

3.3. Activity

Activities permitted

There are no special restrictions for business activity of cooperatives in Finland. Still, the mutual insurance business is regarded to be part of Finnish cooperative movement but they act as mutuals according to different legislation for insurance organisations.

Non-member activities

Finnish Cooperative Act approaches non-member actions as an exception, but chapter 2, section 6 concerns further regulations in the rules (by-laws) of a cooperative, and in rules co-operative can allow non-member actions. There is no separate counting for non-member activities, and cooperatives whole surplus can be the basis of dividing surplus to members.

3.4. Forms and modes of setting up

A co-operative may be incorporated by no fewer than three private individuals or organisations, foundations or other legal persons. An incorporator shall become a member of the co-operative. A person without legal capacity and a bankrupt person cannot be an incorporator. (Co-operative Act, Chapter 2, Section 1 - Incorporators)

Incorporators shall draw up an incorporation instrument, to be signed and dated by incorporators. The instrument shall contain information described in Cooperative Act, chapter 2, section 2. These are e.g. rules of the cooperative, information on incorporators and shares devolving on them. The incorporation instrument is regarded as a contract between incorporators to establish the cooperative.

3.5. Membership

Co-operative Act, Chapter 2, Section 1 - Incorporators:

"(1) A co-operative may be incorporated by no fewer than three private individuals or organisations, foundations or other legal persons. An incorporator shall become a member of the co-operative.

(2) A person without legal capacity and a bankrupt person cannot be an incorporator."

Cooperative Act has no regulations that members should use cooperative's services but in the rules there could be stipulations both regarding membership requirements and grounds for expulsion. Membership decisions are done by the board of directors.

Investment in cooperative

Members have multiple tools to invest in their cooperative: shares, voluntary shares, supplementary shares and investment shares. Supplementary shares are available also for non-members if stipulated in rules, and investment shares are available for non-members. There are no restrictions in Cooperative Act for the amount or proportion of non-member investment. Only basic shares give power of decision so the power is always in the hands of members.

3.6. Financial profiles

There is no minimum capital requirement for cooperatives in Finland, and the share capital is variable depending on the number of members or changes in number or value of shares.

Cooperative can allocate yearly surplus to the development of cooperative, in reserves but also divide it based on the transaction with members. Cooperative can divide surplus

also by paying reasonable interest on shares but there are no mentions in legislation of what is "reasonable" to keep the interest paid taxed as capital income. There are some assumptions that the interest should not exceed 9 % which is interest used when counting the tax-free proportion for limited company's dividend based on company's net assets.

The reserves

In Finnish Cooperative Act there are rules that (obligatory) reserve fund has to be augmented when a cooperative makes profit (until level of 1% of balance sheet total is reached, minimum of 2500 eur), this is 5% of surplus made (OKL 1488/2001, 8: 9§; Cooperatives Act 1488/2001, chapter 8, section 9). This is taxed like other surplus. Reserve fund is a part of cooperative's fixed capital and thus can't be distributed to members.

About other funds, there are multiple rules and guidance for taxation, e.g. when a cooperative adds value to cooperative (shares) directly from surplus (revaluation).

Dissolution

In case of dissolution the basic principle according to Cooperative Act is that the share of the member shall consist of 1) a share of the distributable assets proportionate to the member's share in the cooperative, but no more than the paid-up amount of the share price; and 2) after the share price refunds, a share of the reminder of the assets of the cooperative proportionate to the number of members in the cooperative. If stipulated in rules, the remainder (2) of assets may be 1) distributed to the members in accordance with some other basis; 2) distributed to the owner's of supplementary shares and investment shares; and 3) used for a purpose stipulated in the rules or decided by the general meeting.

Financial instruments

Cooperatives can issue financial instruments. As stated earlier, members have multiple ways to invest in their cooperative: shares, voluntary shares, supplementary shares and investment shares. Supplementary shares are available also for non-members if stipulated in rules, and investment shares are available for non-members. There are no restrictions in Cooperative Act for the amount or proportion of non-member investment. Only basic shares give power of decision so the power is always in the hands of members. A cooperative can also take out capital loan.

Public information

A cooperative is obliged to provide balance sheets and to deposit them at National Board of Patents and Registration of Finland (NBPR).

3.7. Organisational profiles

Structure

Basic structure of cooperative is based on general meeting as the organ that uses the decision power of members. Other choice is that it is stipulated in the rules that instead of general meeting, members' power of decision is to be exercised by delegates elected by the members.

Voting rights

In general meeting there is the principle of one member, one vote unless stipulated in the rules otherwise. It is possible that there are differentiated numbers of votes between members. The number of votes of one member may be more than ten times the number of votes of another member on in a co-operative in whose rules it is stipulated that the majority of members are to be cooperatives or other legal persons. Thus, in other cooperatives the numbers of votes can differentiate only up to ten times.

Management

Management of the cooperative is based on board of directors (obligatory), which is elected by general meeting. It maybe also stipulated in the rules that cooperative has supervisory board, and further that it shall elect the members for the board of directors. Also non-members can be in the board of directors.

External auditor

Cooperative or any company is not obliged to have external auditor if not more than one of the following conditions were met in both the past completed financial year and the financial year immediately preceding it: 1) the balance sheet total exceeds 100 000 euros; or 2) net sales or comparable revenue exceeds 200 000 euros, or; 3) the average number of employees exceeds three (Auditing Act 459/2007). In many cases at least two of the criteria is met, so only smallest cooperatives don't have to have external auditor but in practice they usually want to maintain similar type of auditing.

3.8. Registration and control

A cooperative shall be notified for registration within six months of the signing the incorporation instrument, as specifically provided. This means registration to general company register called the Trade Register, which is held by National Board of Patents and Registration of Finland (NBPR). By this registration cooperative gets Business Identity Code. There is only public control which is implemented through register and Business ID, mainly concerning taxation, annual accounts and representatives of companies.

3.9. Transformation and conversion

A cooperative can be reincorporated as a limited-liability company. This can be done without liquidation proceedings so that the members of the cooperative receive as consideration the entire stock of the limited-liability company. The qualified majority in the general meeting needed is at least two thirds of votes cast. Before this the board of directors shall prepare draft terms of reincorporation. (Cooperative Act, chapter 18)

3.10. Specific tax treatment

Taxation principles

Basically, the same taxation principles apply to all Finnish enterprises, also cooperatives. There are some exceptions for cooperative, that are mentioned in tax legislation and tax guides. Also you have to mention that there are no special tax benefits for cooperatives, in fact the capital income from cooperative (interest on shares) is taxed harder. The specific treatments are mainly technical and relate to surplus.

The amounts paid to the members because of the cooperative trade.

First of all, cooperatives and their members have normal taxation on their trade in daily business. If a member sells products to his/hers cooperative, it is his/hers normal income. For cooperative, this is normal cost. This applies also to wages in worker cooperatives.

What comes to surplus, it is possible for a cooperative to pay surplus to members based on trade and/or as an interest on capital invested (on shares) (OKL 1488/2001, 8: 1-2§; Cooperatives Act 1488/2001, chapter 8, sections 1-2).

In legislation there are clear rules for this. If the surplus is divided according to the trade, cooperative can make same deduction in taxation. And again, this is normal income for the member. (EVL 18 §, 27 §; Act on the Taxation of Business Profits and Income from Professional .Activities sections 18 and 27, Verohallituksen ohje Dnro 983/345/2006, 14.6.2006; National Board of Taxes Guide Dnro 983/345/2006, 14.6.2006)

Interest on shares is not deductible.

The reserves

In Finnish Cooperative Act there are rules that (obligatory) reserve fund has to be augmented when a cooperative makes profit (until level of 1% of balance sheet total is reached, minimum of 2500 eur), this is 5% of surplus made (OKL 1488/2001, 8: 1§; Cooperatives Act 1488/2001, chapter 8, section 9). This is taxed like other surplus.

About other funds, there are multiple rules and guidance for taxation, e.g. when a cooperative adds value to cooperative (shares) directly from surplus (revaluation).

The bonuses to members

In consumer cooperatives bonuses are "tax-free" for members, they are kind of "late discount" . In cooperative banking bonuses related to e.g. sums on a members bank accounts are considered as capital income. In e.g. agricultural cooperatives bonuses are normal income for member's business. (Verohallituksen ohje Dnro 71/39/2000 18.2.2000; National Board of Taxes Guide Dnro 71/39/2000 18.2.2000)

Non-member activities

Finnish Cooperative Act approaches non-member actions as an exception, but chapter 2, section 6 concerns further regulations in rules, and in rules co-operative can allow non-member actions. And they usually do so. There is no separate counting for non-member activities, the whole surplus can be the basis of dividing surplus to members.

Interest on shares

Taxation of capital income was reformed in Finland 2004. As a result, capital income paid to owners from limited companies (dividend) is tax-free up to 90 000 euros, but for cooperatives (interest on shares for members) this limit is only 1500 euros. This was a serious setback for cooperatives, and debate has been going on since then to correct the situation. Difference in tax-free proportion of capital income makes collecting of fixed capital to cooperatives more difficult compared to limited companies.

3.11. Existing draft proposing new legislation

For few years there has been preparation going on to make a draft of a new Cooperative Act. The main reason for this is to harmonise Finnish legislation. At the moment there will be no changes to the basic principles of present Cooperative Act but the structure will be harmonised with Limited Liability Companies Act. There is also aim to avoid references and to situate the most often applied stipulations first in the text. Pellervo Confederation of Finnish Cooperatives and the Ministry of Justice are together preparing the draft and the new Cooperative Act should be given 2012.

3.12. Essential bibliography

Verohallituksen ohje Dnro 983/345/2006, 14.6.2006 (National Board of Taxes Guide Dnro 983/345/2006, 14.6.2006)

Laki elinkeinotulon verottamisesta EVL 360/1968 (Act on the Taxation of Business Profits and Income from Professional Activities 360/1968)

Taxation in Finland 2009

English http://www.vero.fi/nc/doc/download.asp?id=4151;1035296

Osuuskuntalaki OKL 1488/2001 (Cooperatives Act 1488/2001, unofficial English version delivered)

Pöyhönen, Seppo; Osuuskunnan hallinto ja osuuskuntalaki, Talentum, Helsinki 2005 (Pöyhönen, Seppo; Cooperative administration and Cooperative Act, Talentum, Helsinki 2005)

Verohallituksen ohje Dnro 71/39/2000 18.2.2000 (National Board of Taxes Guide Dnro 71/39/2000 18.2.2000)

Tilintarkastuslaki TTL 459/2007 (Auditing Act 459/2007, English version http://www.finlex.fi/fi/laki/kaannokset/2007/en20070459.pdf)

4. The SCE Regulation and national law on cooperatives

SCE Regulation and Cooperative Act

As stated earlier, Finnish implementation of SCE Regulation is quite concise, still clear and thorough. Finnish SCE Act follows the basic principles of Finnish company legislation, providing their own act for each type of organisation. As we already had own legislation for cooperatives (since 1901) it was obvious to benefit it and base the SCE Act on implications to this Cooperative Act. When choosing this way of implementation there were only few technical changes made to Cooperative Act and other business legislation: Trade Register Act, Business Information Act, Trade Name Act, Business Mortgage Act, Act on Credit Institutions, and Cooperative Bank Act.

Legal obstacles

Taxation of capital income was reformed in Finland 2004. As a result, capital income paid to owners from limited liability companies (dividend) is tax-free up to 90 000 euros, but for cooperatives (interest on shares for members) this limit is only 1500 euros. This was a serious setback for cooperatives, and debate has been going on since then to correct the situation. Difference in tax-free proportion of capital income makes collecting of fixed capital to cooperatives more difficult compared to limited companies. And of course, taxation doesn't treat equally e.g. members of meat processing cooperatives compared to owners of family enterprises. As the member farms of dairy and meat processing cooperatives have grown bigger and the cooperative shares are based to their producing capacity, the share capitals are quite remarkable. Thus, taxation of interest on share affects directly to the cooperative members.

Differences in taxation also favour different type of holding structures in the form of limited liability companies to be applied for worker-owned enterprises, e.g. in medical centers owned by doctors. In these cases taxation of earned income is changed to much favourable capital income. This has arisen larger debate in Finnish society.

FRANCE

By Chantal Chômel

SUMMARY. Introduction – **1.** The implementation of SCE Regulation 1435/2003 in French legislation. – **1.1.** Source and modes of implementation. – **1.2.** Structure and main contents of the regulation and adaptations of the above mentioned law of 10 September 1947. – **1.3.** Decree n° 2009-767 – 22 June 2009. – **2.** Transposition of Directive 2003/72/CE of the Council dated 22 July 2003. – **3.** Analysis and comments of the use of European cooperative society status in France. – **3.1.** Methodology. – **3.2.** Analysis and comments. – **4.** Overview of cooperative legislation in France. – **4.1.** The legal organization of cooperatives in France: generalities – **4.1.1.** Bank cooperatives and consumer cooperatives that are markedly dependent on the general law of 10 September 1947 and have the form of a commercial corporation. – **4.1.2.** The cooperatives of SMEs enterprises (agricultural, artisans, transporters, maritime and retail tradesmen to a smaller extent) as well as SCOP (worker cooperatives) are all governed by particular provisions that include more specific clauses, particularly concerning the purpose, membership, exclusiveness or the distribution of earnings. – **4.2.** Main characteristics of legal system for cooperatives. – **5.** Tax system for cooperatives in France. – **5.1.** Company tax. – **5.2.** Regional economic contribution. – Conclusion. – Annex 1

Introduction

The transposition of regulation 1435/2003 concerning the European cooperative society was not completed in French law until June 2009 (cf. below).

The legal system governing cooperatives in France is characterized by some complexity, closely linked with the history of the emergence of cooperatives in the various economic sectors at the end of the 19th Century, but also later in the 20th Century.

Even if all cooperatives refer – at least implicitly – to the principles of the ICA (International Cooperative Alliance), the translation into positive law varies depending on the status involved.

Status as cooperative must be interpreted by combining several textual aspects:

- Articulation special laws concerning cooperatives with the general law – law No. 47-1775 of 10 September 1947 establishing cooperation status;
- Articulation with status as a non-trading or commercial company, or existence of unique status.

The fact is that even if certain authors have accepted the idea that cooperatives could be established on the basis of recourse only to the law of 10 September 1947, in practice that option is not adopted – essentially for reasons of legal security.

1. The implementation of SCE Regulation 1435/2003 in French legislation

1.1 Source and modes of implementation

The regulation was transposed by way of two documents, one of them legislative and the other regulatory, both adopted very belatedly since article 80 of the regulation provided for it to go into effect on 18 August 2006, and France did not adopt the application texts until 2008.

- Law No. 2008-649 of 3 July 2008 containing various provisions adapting company law to community law;
- Decree No. 2009-767 of 22 June 2009 concerning the European cooperative society.

As indicated above, transposition of the regulation is carried out only by way of the general law of 10 September 1947. It would no doubt have been too complicated and too burdensome in terms of legislative procedures to provide for a transposition into the specific texts proper to each cooperative sector. Moreover, since the text of the regulation prevails over national laws, solutions can be found in the articles of statutes of each SCE.

The regulation treats the major principles of cooperative law, already known in French law, at the community level.

Despite the convergence efforts made by the regulation, the new status refers largely to the national rights of cooperative societies or of corporations in order to supplement it.

Notwithstanding such references, it institutes numerous harmonized material rules for constitution, operation, annual financial statements, dissolution and liquidation of the SCE, defined as a variable capital company having the purpose of satisfying the needs or the development of its members' economic or social activities.

Thus the European cooperative appears as a hybrid company governed by the provisions of the regulation and by national provisions.

A new title is inserted in the law of 10 September 1947 in order to provide a national legal basis for the European cooperative society. This new title III *bis*, coming just after the provisions concerning the legal regime of national cooperative societies and before the miscellaneous provisions of the text, contains a certain amount of detail, since it includes no fewer than seven chapters consisting of thirty-nine articles.

Adaptations of the Labour Code and of the Monetary and Financial Code are also required to take account of the social aspect of European cooperatives and the banking sector.

1.2 Structure and main contents of the regulation and the adaptations of the above-mentioned law of 10 September 1947

A new title III *bis* is inserted in the law of 10 September 1947, called the "European cooperative society". That title includes seven chapters and articles numbered 26-1 to 26-38.

Article 26-1 constitutes the sole article of chapter I, devoted to the general provisions. It defines the conditions under which the European cooperative acquires legal personality as well as the provisions applicable to its constitution and to its operation in France.

Moreover, **making use of an option contained in the regulation**, it prohibits dissociation between the registered office under the articles of association and the actual head office, in the interest of consistency with the provisions applicable to the European company. (Article 6 regulation SCE)

In articles 26-2 to 26-6, Chapter II establishes the procedures relative to constitution of the European cooperative registered in France.

Section 1 is devoted to constitution by way of merger of cooperative societies subject to the laws of at least two different member States.

Article 26-2 contains the provisions applicable to constitution of an SCE by merger, referring to the special laws governing cooperatives taking part in the merger. Thus an SCE may be constituted in accordance with a special law.

Article 26-3 makes designation of merger auditors mandatory at the time of constitution of the European cooperative, and lays down the procedures regarding their designation as well as their assignments.

Point I of article 26-4 designates **the clerk's office of the Commercial Court** within the district of which the company in question is located as the authority responsible for supervising the formalities prior to constitution of the SCE by way of merger. That office issues an attestation of conformity concerning the operations prior to the merger (Art 29 regulation SCE).

Point II designates **the notaries or the clerk of the Commercial Court** to check on the legality of execution of the merger and of the definitive constitution of the European cooperative registered in France (Art 30 regulation SCE).

They will have to particularly check on the regular nature of the attestation issued by the foreign authority responsible for supervising the preliminary formalities as well as the procedures for involvement of the workers and the conformity of the merger projects to the provisions in effect.

Article 26-5 governs the consequences of a reason for nullity affecting the decision made by the meeting deciding on the merger, as well as the consequences of a lack of a check on legality. When the nullity cannot be remedied or in the absence of a check on legality, the society must be dissolved and then be liquidated.

Article 26-6 designates **the National Prosecutor as the authority** empowered to protest, for reasons of public interest, against the transfer of the registered office entailing a change of applicable law or against constitution of an SCE by way of merger. He may be applied to by the administrative authorities (Article 7 et 21 regulation SCE).

Section 2 specifies the procedures for constitution of a European cooperative by transformation of a national cooperative having a subsidiary in a member State other than the one of the parent company.

Article 26-7 lays down the measures for adaptation making it possible to transform a national cooperative into a European cooperative, and organizes protection of the holders of special partner's shares or of the holders of investment or partner's certificates at the time of the said operation.

Article 26-8 adopts the option by which the project for transformation of the cooperative into an SCE must be adopted by a qualified majority of the Board of Directors, and, if the case arises, by the Supervisory Board, when worker participation is organized. It makes designation of a transformation auditor mandatory.

Chapter III is devoted to the transfer of the registered office of SCE registered in France. It includes articles 26-9 to 26-14.

Article 26-9 allows a European cooperative registered in France to transfer its registered office to another member State of the European Union. It lays down the conditions for realization of the transfer and requires, for that purpose, establishment of a transfer project by the Board of Directors.

Article 26-10 organizes protection of the minority partners opposed to the transfer. If the case arises, they may withdraw from the cooperative and obtain reimbursement for their shares.

Articles 26-11 and 26-12 define the rights of the holders of cooperative investment certificates and of the holders of cooperative partners' certificates, in case of transfer of the registered office. Those Securities are redeemed.

Article 26-12 provides for redemption of the Securities held by the bond creditors in case of a transfer of registered office.

Article 26-13 contains provisions for protection of non-bond creditors. They may obtain either additional guarantees or reimbursement of their claims.

Article 26-14 designates the notaries for issuing a certificate attesting to the legality of the transfer procedure in application of paragraph 8 of article 7 of the regulation.

In articles 26-15 to 26-28, Chapter IV contains the provisions relative to management and organization of the European cooperative. It is divided into seven sections.

Article 26-15 entitles the European cooperatives registered in France to choose either a monistic-type organization, with a Board of Directors, or a dualistic type, with an Executive Board and a Supervisory Board.

“In that connection, it is useful to remind you that the cooperative status of companies is not to be analyzed as a set of complete and autonomous rules, but rather as an addition to commercial common law. In principle, cooperatives are non-trading or commercial companies, like the others, and are also governed by cooperative status. Hence it appears perfectly logical for those companies to be able to choose an institutional architecture in line with those of their non-cooperative counterparts” (report by the Committee of Laws . National Assembly – July 2008).

Section 1 governs the monistic SCE. It determines the business organ responsible for representing the company vis-à-vis third parties (article 26-16), in principle the Board of Directors, the number of members of which ranges from 3 to 18. The articles of association also provide that general management may be exercised either by a President or by a Managing Director.

Article 26-17 authorizes legal entities to be members of the Board of Directors.

Article 26-18 introduces a right of communication of documents needed by any director for performance of his duties.

Section 2 governs the dualistic cooperatives.

Article 26-19 designates the business organ representing it vis-à-vis third parties.

Article 26-20 lays down the powers of the Executive Board vis-à-vis third parties.

Article 26-21 defines the procedures for designation of the members of the Executive Board and their status as individuals.

Article 26-22 lays down the procedures concerning the replacement in case of a vacancy

Article 26-23 contains the procedures regarding composition of the Supervisory Board as well as the rights of the members of that Board.

Article 26-24 institutes, in particular, an individual right to information for the Supervisory Board members.

Section 3 specifies, in articles 26-25 and 26-26, the rules that are common to the monistic and dualistic cooperatives.

In the interest of consistency with the law of corporations and European companies, article 26-25 institutes an obligation to have SCE articles of association contain rules applicable to conventions concluded between the company and its senior managers identical with the rules for corporations, subject to the particular provisions applicable to cooperatives in this domain and provided for in article 27 of law (of 1947).

Article 26-26 lays down the cases in which the directors, and the members of the Executive Board may be held liable. The members of a Supervisory Board do not incur liability for management faults.

Section 4 leaves it up to the articles of association to determine the conditions for approval of new cooperative partners (article 26-27).

Section 5 in article 26-28 lays down the rules applicable to partners' general meetings, referring to the national legislative provisions established for each type of cooperative. It is one of the transposition articles referring explicitly to particular status.

Section 6 organizes the procedures for legal auditing of SCE accounts (article 26-29), both with respect to corporate financial statements and in connection with combined or consolidated financial statements.

Section 7 (article 26-30) deals with cooperative auditing for the SCE falling into a specific category.

Chapter V specifies, in article 26-31, the provisions applicable to establishment of SCE annual financial statements, specifying that the provisions of article L 524-6-5 of the Rural Code are applicable to the SCE subject to the Rural Code.

Chapter VI lays down the measures relative to dissolution and liquidation of the SCE.

Article 26-32 establishes the reasons for nullity of an SCE: either at meetings deciding on merger, or due to a lack of a legality check. It specifies the time limitation for this, which is six months.

Article 26-33 establishes the adaptation measures making it possible to prevent and sanction dissociation between the registered office under the articles and the central administration in two different member States. Any interested third party may apply to the courts for regularization, the courts setting a period for the latter.

Article 26-34 proves for dissolution in the absence of regularization within the period set by the court.

Article 26-35 provides **that the National Prosecutor** is designated as the authority responsible for informing the competent authority of the other member State or having to be informed by it, in case of a violation of the said prohibition on dissociation. (art 73 regulation SCE)

Article 26-37 provides for liquidation of the SCE when dissolution has been pronounced.

In articles 26-38 to 26-40, Chapter VII lays down the procedure for transformation of an SCE into a national cooperative.

Article 26-38 authorizes transformation of an SCE into a cooperative under national law as long as it has been registered for two years and has received approval of the balance sheet for its first two financial years.

Article 26-39 requires appointment of one or several transformation auditors subject to the types of incompatibility affecting the legal auditors.

Article 26-40 specifies the rules for making decisions at general meetings authorized to make decisions concerning modifications of the articles of statutes.

Finally, various coordination provisions supplement this transposition:

Article 20 creates an article L. 511-13-2 in monetary and financial code to enable the Committee on Credit Institutions and Investment Companies (CECEI) to supervise

transfer of the registered office of a credit institution constituted in SCE form, as well as concerning the participation of a cooperative credit institution in constitution of an SCE by merger. The said check is paired with a right to protest against such operations, supplementing the right of the National Prosecutor. As is true of the latter, the CECEI protest must be based on reasons of public interest.

Article 21 creates an article L. 532-9-3 in the same code entitling the Financial Markets Authority to protest in connection with the same operations as the ones covered by article L. 511-13-2, mentioned above. The said right is exercised vis-à-vis investment trusts.

Article 22 makes the provisions relative to corporate or consolidated and/or combined financial statements applicable to the SCE in agricultural cooperative form.

Article 27 makes the violations provided in the case of national cooperative companies applicable to the SCE.

1.3 Decree n° 2009-767 - 22 June 2009

The Decree of 22 June 2009 specifies the list of information that must be made available to third parties at the time of constitution by merger, transformation or transfer of the registered office.

It also indicates the documents with which the notary must be provided so that he can check on the legality of the transfer of the registered office.

2. Transposition of Directive 2003/72/CE of the Council dated 22 July 2003

We will not linger over this aspect of transposition, which is largely inspired by the texts concerning the European companies and is not subject to the specific cooperative features.

The Directive was transposed before the regulation itself by way of:

- Law No. 2008-89 of 30 January 2008 concerning implementation of the community provisions concerning status as European cooperative society and protection of salaried workers in case of employer insolvency.
- Since the Labour Code was modified and gave rise to a new Labour Code, it is Title III of the said law that transposes the Directive mentioned above.
- This text is supplemented by two decrees:
- A decree in Council of State No. 2008-439 of 7 May 2008 concerning employee involvement in the European cooperative society;
- Simple decree No. 2008-440 of 7 May 2008 concerning employee involvement in the European cooperative society.

3. Analysis and comments of the use of European cooperative society status in France

The transposition of SCE status in French law was comprehensive and highly detailed, albeit late; the law is dated 3 July 2008. This means it is still slightly too early for a reliable, objective assessment of how SCE status is used or to consider its lack of use a failure.

Despite a legal seminar organised by the *Groupement National de la Coopération* in 2004 and several presentation documents provided by several national cooperative organisations – agricultural, carrier and retailer cooperatives, credit unions and worker cooperatives in particular – the status of European Cooperative Society is still poorly and little known.

Nevertheless, in light of the extensive involvement of French cooperative societies in the project and their desire to see it completed, special care has been taken to include their point of view regarding the rather disappointing use of the new status so far. It is necessary to understand where are the obstacles that undermine the appeal of this status and which are the sectors of activity concerned, i.e., agriculture, other company cooperatives, cooperatives of workers and consumers or banking cooperatives, for example.

However, for all the parties concerned, SCE status does have an intrinsic justification in itself which is not directly impacted by current low usage. Its existence is highlighted as necessary, irrespective of the degree of current or even future usage.

3.1 Methodology

Three means were used to collect the requisite information:

- **Questionnaires circulated by e-mail between December 2009 and February 2010:**
  - A preliminary questionnaire was sent out to all cooperative organisations to establish the number and presence of SCEs in December 2009
  - A second questionnaire was sent out in February 2010 to the same cooperative organisations as well as to some twenty major agricultural cooperatives to assess their point of view on the causes for failure to use SCE status
- **More detailed interviews in March 2010**
  - Interviews with several cooperative executives to learn their analysis
  - Interview with a magistrate in the French justice ministry to see whether it was possible to draw comparisons between usage of SEs and SCEs
- **A round table with legal directors of cooperative unions in April 2010.**

The round table session was intended to develop proposals to improve the SCE status and make it more attractive and better known. The issue most spontaneously raised concerned insufficient communication and ignorance about this new tool. It was suggested that a more systematic campaign circulating the characteristics and possibilities afforded by the new tool should be instituted along with an operating method, which should be effective in the near future.

Conclusions from questionnaires and interviews

The first questionnaire confirmed that there were no SCEs in France at present. French, Italian and Spanish credit unions do have a project, although it should ultimately be regulated by Italian law for reasons to do with Italian banking law.

This means that the other issues raised in the first questionnaire were no longer relevant, as no SCE had been established.

This is also why a second questionnaire was issued with a two-fold objective:

- Appreciate the existence of transnational operations implemented by cooperatives and assess their intensity
- Appreciate their knowledge of SCE status and describe any reservations.

3.2 Analysis and Comments

a) Existence of transnational operations

Most of the cooperative organisations responding to the question stated that their cooperatives – or some of them – carried out transnational operations, even though they were probably less frequent than those carried out by business corporations. Their primary objective was to meet the needs of their members whose economic or social activity focused on a given region. However, even this situation is inherent to cooperative approach, it is not a radical obstacle to international expansion.

Current forms of international expansion are mostly ‘business corporations’ which are both better known and feature governance rules which are perceived as being clearer and easier to use (in simplistic terms: one share, one vote).

In other terms, in economic partnerships with other countries between cooperatives or other economic actors, the uncertainty arising from growth through a subsidiary shared with another country is offset by the use of ‘corporate’ governance rules that ensure that the parent cooperative remains in control of direction and risks. A cooperative union in the form of an SCE has accordingly failed to prosper contrary to aspirations.

There is a legal prohibition in some activities to implement international operations or even actions outside a local territory with varying degrees of definition (town, country or region). Such a prohibition applies to social housing (“HLM”) cooperatives in France in order to uphold their ‘social’ purpose which has above all a local focus.

For other such as agricultural cooperatives, clearly collecting output does not lend itself well to transnational partnerships. Proximity as a factor must be preserved to fulfil their role for their agricultural members.

However, operations further upstream in the sector do lead to European partnerships which have taken the form of trading companies to date for the reasons stated above.

b) Insufficient dissemination and knowledge about the status

This issue was raised in every interview and questionnaire: despite efforts in communication by cooperative organisations, SCE status is little known by operators and practitioners. In the words of one of our contacts, the fact that several European statuses exist seems to confuse the SCE message and may even dilute it, instead of making it more accessible.

It would appear that the policy message is not sufficiently relayed to practitioners who set up transnational files. Practitioners have not sufficiently adopted this new instrument, although several legal reviews intended for this audience have published analyses and comments about the new approach. Novelty here is not necessarily an asset, as it does cause uncertainty.

Government authorities (the French Justice ministry) and those tasked with the social economy have not made any specific dissemination effort, which contrasts with the new forms of company created in recent years, such as the individual limited liability company ("EIRL – *entreprise individuelle à responsabilité limitée*"). Communication about the new instrument has therefore been ensured primarily by cooperative organisations.

This observation also applies for SE status, for which it is recommended that 'status templates' be made available to creators that could be promoted in particular by the authorities.

c) A relatively high initial transaction cost

This issue concerns the development of the regulations themselves, which are based on a hierarchy of complex norms referring back to various domestic legal systems. Admittedly, this construction does not make the status inaccessible, but does require extensive development work. Needless to say, such complexity is exacerbated by the complexity of French legislation in which several statutes must be taken into account to set up a cooperative company under domestic law. However, in the various instances in question, most cooperative organisations already offer templates for articles of association which can be used if required.

The reference back to domestic laws also prompts a degree of legal uncertainty, as these laws are usually little known by economic actors in other member States and, of course, have not been harmonised or even been made to converge. This factor probably serves as a deterrent to practitioners who tend to strive for the highest possible legal certainty.

In order to lower the initial transaction cost, the *Groupement National de la Coopération* took the initiative of drafting a status for a European cooperative society established from scratch with its head office in France. As of publication of this report, the document is ready for publication and will be circulated by cooperative organisations through their Internet sites in particular. However, the statutes were developed by four legal specialists over a dozen half-day work sessions, which represents an investment that is often beyond the reach of nascent SMEs or VSEs. The intention is that eliminating this obstacle should serve as an asset for establishing European cooperative societies.

The timing, however, means that it is unfortunately too early to draw useful conclusions on how to improve SCE status.

The use of SCE status by natural persons probably makes the initial capital amount relatively high. One proposal would be to lower the capital amounts.

d) Concerns about the genuine 'cooperative nature' of SCEs

For most cooperatives in France, the prohibition on sharing reserves is a vital, long-term guarantee of the cooperative status. Incidentally, this feature offers the benefit of making cooperatives more 'resilient', a benefit which has been demonstrated during recessions.

The prohibition on sharing reserves is framed by laws which regulate cooperatives at various degrees of strictness depending on the specific articles of statutes

SCE status clearly omits to address this issue – other than the legal reserve, the articles of statutes define the reserves which can be shared by means of incorporation in the capital. The hierarchy of statutes accordingly refers to article 16 of French law dated 10 September 1947, which is more flexible than specific legislative measures.

This issue can therefore make the SCE seem a means for further 'cooperative evasion', as the statutes include more flexible provisions for sharing reserves.

The reserve issue is also what differs most between European and specific French legislation.

e) Lack of fiscal appeal

In France, most cooperatives do not have a specific tax system other than the deduction of the rebate on the corporate tax base.

Any fiscal exemptions from corporate tax stem from being 'closed' cooperatives, i.e., cooperatives that implement operations only with and for their own members. These are subject to compliance with stringent measures and concern agricultural, craft, transportation and maritime cooperatives.

Tax statutes are strictly interpreted and may not be extensively understood to apply to a European cooperative society. However, the legal construction of an SCE established in France in, for example, agriculture, cannot be deemed an agricultural cooperative society exempt from corporate tax for operations carried out with its members.

f) Complexity of the employee consultation procedure

The complexity of the consultation procedure was raised in several interviews as a deterrent, although it has not actually been applied in practice. However, complexity can be one of the factors – along with those mentioned above concerning governance – which would prompt SCE usage more towards new cooperative establishments than Second-degree ones and as a means of establishing partnerships between cooperatives in several member States.

Summary:

- Clear lack of knowledge about the transnational tool and its concrete potential along with insufficient adoption by economic actors
- Legal insecurity arising from the lack of knowledge about other European legislations which have not been harmonised
- A preference for joint subsidiaries in trading company status for which the legal system is better known and governance rules perceived as clearer
- Complexity of the SCE tool which generates a significant initial transaction cost, in particular for SMEs and VSEs
- In some cases, there are doubts concerning cooperative security provided by the SCE status, in particular concerning the prohibition on sharing reserves
- Lack of appeal in fiscal terms compared to some other member States.

4. Overview of cooperative legislation in France

French legislation on cooperatives is complex and scattered between provisions not contained in legal codes and those which are.

4.1 The legal organization of cooperatives in France: generalities

All cooperatives are governed – but to various degrees - by law No. 47-1775 of 10 September 1947 establishing cooperation status. The fact is that article 2 thereof provides that “cooperatives are governed by the present law subject to laws that are specific to each category of them”. Hence provisions that are more or less restrictive than the ones provided under the 1947 law may be found in the particular texts.

It was originally planned that a Cooperation Code would be produced, but it has never seen the light of day. Quite on the contrary, the recent trends have been aimed at codifying the texts governing certain types of cooperatives in the codes concerning the activity sectors in question: mutual banks in the Monetary and Financial Code, cooperatives of retail tradesman in the Code of Commerce, HLM (public housing)

cooperatives in the Construction Code, and agricultural cooperatives in the Rural Code, and there is an ordinance providing for adding the maritime cooperatives in the near future. The other documents are uncodified. This dispersion of the texts in question does not facilitate research on cooperatives.

Hence the provisions of the 1947 law must be supplemented by recourse to the particular provisions governing cooperatives, which are more or less developed depending on the sectors.

In summary fashion, one can distinguish between two major orientations:

4.1.1 Bank cooperatives and consumer cooperatives that are markedly dependent on the general law of 10 September 1947 and have the form of a commercial corporation

These are the following, in particular:

- **The law of 7 May 1917 concerning consumer cooperatives**
- **The provisions governing cooperative or mutual banks are now grouped in Chapter 2 of title II of book V of the Monetary and Financial Code:**
  - Section 1 bears on generalities (articles L512-1 and L512-1-1);
  - Section 2: “Popular Banks: articles L 512-2 to L 512-13;
  - Section 3: Crédit Agricole: articles L 512-20 to L 512-54;
  - Section 4: Crédit Mutuel: articles L 512-55 to L 512-59;
  - Section 5: Crédit Mutuel Agricole et Rural: article L 512-60;
  - Section 6: cooperatives banks corporation: articles L 512-61 to L 512-67;
  - Section 7: Maritime Mutual Credit: articles L 512-68 to L512-84;
  - Section 8: savings banks Network articles L 512-85 to L 512-105;
  - Section 9: Central organ savings banks and mutual banks: articles L 512-106 to L512-108.

4.1.2 The cooperatives of SMEs enterprises, (agricultural, artisans, transporters, maritime, and retail tradesmen to a smaller extent) as well as the SCOP (worker cooperatives) are all governed by particular provisions that include more specific clauses, particularly concerning the purpose, membership, exclusiveness or the distribution of earnings.

- Agricultural cooperatives: Book V, title II of the Rural Code,
- Cooperatives of retail tradesmen: articles L 124-1 to L 124-16 of the Code of Commerce (Book I - Title II - chapter 4);

- Cooperatives of artisans (craftsmen), maritime cooperatives, cooperatives of maritime interest and transporters' cooperatives: Law No. 83-657 of 20 July 1983 (uncodified);
- Worker production cooperatives: Law No. 78 -763 of 19 July 1978 (uncodified);
- Construction cooperative corporations: articles L 213-1 to 213-15 of the Construction and Habitation Code;
- HLM (public housing): articles L 422-12 to L 422-15 of the Construction and Habitation Code;
- Finally, the SCIC – cooperative societies of collective interest – are governed by a particular title of the law of 1947, title II ter.

This dispersion and the common nature of the law of 10 September 1947 are no doubt the reasons that led French legislators to transpose the regulation concerning the European cooperative society solely in the law of 10 September 1947.

4.2 Main characteristics of legal system for cooperatives

A detailed presentation of each specific cooperative status does not fall within the purview of an assessment report on the implementation of SCEs. This section is merely a summary presentation addressing some of the major features with the aim of identifying whether they apply to an SCE established in France without a specific status other than the general legal statutes concerning cooperatives.

1) <u>Cooperative purpose and their establishment</u>

French law No. 47-1775 dated 10 September 1947 concerning cooperative status is a law applicable to all cooperatives and defines a general purpose. It is supplemented by specific laws.

Article 1 of this law states that "*cooperatives are companies whose essential purpose is to:*

1) restrict to their members and through their shared effort the cost price and, where applicable, the sales price of specific products or services by assuming the function of entrepreneur or intermediaries whose remuneration would affect the cost price

2) improve the trade quality of products supplied to their members or those manufactured by them and delivered to consumers

3) more generally, help satisfy needs and promote the economic and social activities of their members and their training.

Cooperatives may act in every branch of human endeavour".

Despite the last sentence, some activities – such as insurance – are prohibited from using a cooperative approach and must be undertaken in the form of mutual companies.

The purpose of cooperatives therefore focuses on fulfilling the needs of their members. In general, members are qualified by a parity relationship with the cooperative. They may be categories of employees (worker cooperatives), clients (credit unions and consumer cooperatives) or suppliers and/or clients (family enterprise cooperatives). Only SCICs – *sociétés coopératives d'intérêt collectif* [cooperative societies of collective interest] –are multi purposes cooperatives and differ from this approach with a membership structure divided into several categories (employees, users, volunteers, investment partners and regional authorities). This status is a recent one; it was introduced in the French law dated 10 September 1947 by law No. 2001-624 dated 17 July 2001.

The purpose of fulfilling members' needs is bolstered in corporate cooperatives (crafts, carriers', maritime, retailers' and farmers' cooperatives). Their primary purpose is to enable their members to improve their competitiveness, in particular by jointly undertaking various functions for members through the cooperative such as supply, sales or miscellaneous services to members and training. Each specific statute reformulates this purpose with an adaptation to the sector in question.

Cooperatives can be freely established and are listed in the Trade and Companies Register just like any other company. Some cooperatives, however, also require authorisation or specific listing as a result of their cooperative status:

- Agricultural cooperatives acquire this status only after a decision has been issued by the *Haut Conseil de la coopération agricole*
- SCOPs [worker cooperatives] are registered in a ministerial list published each year in the Official Journal
- SCICs [cooperative societies of collective interest] require authorisation from the prefect's office every five years.

An SCE established in France has an analogous purpose and does not require administrative authorisations or registration to be established.

2) General dispositions of the legal system for cooperatives in France

- **Cooperatives are companies with individualised capital** divided into shares held by each member. The minimum number of shares to be held by a cooperative member is set in the articles of statutes and may be proportional to the member's activity with the cooperative.
- **They are mostly companies with variable capital** in order to apply the 'open door' principle. Even so, there are some fixed equity cooperatives. The minimum capital is half of the capital required to establish joint stock companies, i.e. half of €37,000 or €225,000 for publicly listed companies (articles L 231-1 to L 231-8 of commercial code).

- **They are mostly trading companies**: the 10 September 1947 law is insufficient as a legal framework to set up and organise a company. This means cooperatives resort to a commercial status either as a limited liability company [SARL - *société à responsabilité limitée*] or as a joint stock company [SA - *société anonyme*]. Credit unions and retailer cooperatives are always joint stock companies, the only exception being agricultural cooperative companies which the law has endowed with its own kind of status that is neither civil nor commercial.
- **The number of members** is set by the form of company chosen: there must be at least two in limited liability companies and seven in joint stock companies as well as at least seven stipulated by the Rural code for agricultural cooperatives.
- **The admission of new members** is generally organised in the articles of statute (article 7 of the 10 September 1947 law). In company cooperatives which are normally qualified by a high degree of inter-personal relations, new members are admitted as a result of a decision by the board of directors. The board may, however, delegate this function to a committee, for example. In 'open' cooperatives, such as credit unions and consumer cooperatives, the admission procedure is generally more flexible (although there may be exceptions).

The SCE is a society with limited liability, variable capital and a minimum capital of €30,000.

3) Exclusivity

Article 3 of the 10 September 1947 law prohibits operations with non-members except when so allowed by specific laws.

However, the situation varies strongly in this regard:

- **Consumer cooperatives and credit unions** may undertake operations with non-members without any statutory limitation other than whatever measures they include in their articles of association. These are 'open' cooperatives.
- **Cooperatives of SMEs** are subject to far more restrictive legislation: these are 'closed' cooperatives; the type of natural person or legal entity eligible for membership is strictly defined by specific laws which regulate them. Cooperatives of retailers may not undertake any operation with non-members, whilst agricultural, maritime, craft and carrier cooperatives may undertake operations with non-members to the extent of 20% of their turnover. Agricultural cooperatives may undertake operations only with a geographic region stipulated in their articles of association.

- **SCOPs – or worker cooperatives** have employees who are not required to be members, although if they so request after one year's presence in the cooperative, they become members by right.

The SCE may exempt itself from exclusivity restrictions in its articles of association. Where applicable, such articles set the limits on operations with non-cooperative third parties.

4) Registered capital and non-cooperative members

a) Remuneration

As company capital is initially owned only by cooperative members, in a variable capital company in which the stable 'company capital consists of indivisible reserves, it does not necessarily serve the same function as in trading companies.

This difference means a restriction in any ensuing remuneration. When it is remunerated (which is not always the case), it takes the form of interest, not dividends, which article 14 of the 1947 law has capped at a remuneration rate for private bonds published twice yearly by the finance ministry.

There are exceptions to this statutory ceiling:

- Cooperatives regulated by French law dated 20 July 1983 (i.e., craft, maritime and carrier cooperatives) cannot remunerate their equity
- In contrast, worker cooperatives (SCOPs) may avail themselves of an exemption which makes it possible to pay more to the member employees.

An SCE may remunerate capital to the extent laid down by article 14 of the 10 September 1947 law.

b) Admission of non-users cooperative members or investors members and share diversification

To enable cooperatives to consolidate own funds and registered equity in particular, the law includes measures to strengthen this. Two means have been used:

b1) Company capital is opened up to non-users members, or investors members i.e., those not using the cooperative's services

General provisions concerning cooperatives

A 1992 measure was included in the 10 September 1947 law (article 3 bis) to authorise the inclusion of investor members "who are not intended to use their services or their work but do intend to contribute through capital to achieving the cooperative's objectives".

Investor members may not hold more than 33% of votes – 49% if they are another cooperative – and their voting rights are proportional to the capital held to that extent.

These measures apply to credit unions, consumer cooperatives, retailer cooperatives and worker cooperatives.

They do not, however, apply to agricultural cooperatives (which have their own system) or to cooperatives regulated by the 20 July 1983 law.

Agricultural cooperatives

The process took place in 1972 for agricultural cooperatives which were allowed to include non-agricultural investor's members, although a cap was set on the capital ownership at under 50% with the number of board members restricted to one third of the board. Remuneration for non-cooperative partners may exceed cooperative partners' by two points (article L 522-3 of the rural code). Voting rights can be exercised on a 'one-man-one-vote' basis.

Cooperatives regulated by the 20 July 1983 law: these cooperatives may have investor's members which are defined as 'natural persons or legal entities interested in the cooperative purpose' to the extent of four members. Only cooperative shares can be remunerated to the extent laid down by article 14 of the 10 September 1947 law (see above).

The SCE may include investor members if authorised in its articles of statutes, which can allow them proportional voting rights of up to 25% of votes.

b2) Creation of different categories of shares

Legal statutes have also diversified categories of shares by introducing measures to make them more attractive in remuneration terms or offer other benefits.

Shares with specific benefits

Such shares, which feature benefits defined in the articles of statutes, are held by cooperative and investors members. They do entitle access to reserves or additional voting rights. They can be transferred between members.

Apart from cooperatives regulated by the 20 July 1983 law, all cooperatives can issue shares with specific benefits (article 11 of the 10/09/1947).

Priority interest shares without voting rights (article 11 bis of the 10/09/1947 law)

These shares are held either by investor members or by third parties who are not users and do not confer voting rights. In contrast, they do accrue priority interest. If not paid for

three years, bearers of such shares acquire proportional voting rights to the extent defined for investor members

Credit unions, consumer, retail and worker cooperatives can avail themselves of this option.

Saving shares for agricultural cooperatives (article L 524-2-1 of the rural code)

The law makes it possible to convert part of the rebates into saving shares, which is a specific measure for allocating results and is intended only for cooperative members.

The SCE can include an option in its articles of statutes to create shares with specific benefits and if it has investor members, priority interest shares without voting rights.

- **Reminder of other financing tools**

The 1947 law includes the possibility of issuing cooperative investment certificates, which are negotiable securities without voting rights whose main feature is to offer a potential right on reserves. Only credit unions have used this instrument.

In addition, cooperatives can also issue participating securities, i.e., bonds with remuneration partially correlated with the cooperative's results.

An SCE may include an option in its articles of statutes to issue cooperative investment certificates and/or participating securities.

5) Allocation of results and reserves which cannot be shared

a) Patronage refund

As stated above, capital remuneration is either capped or prohibited. The preferred method for sharing surpluses in the cooperative remains the patronage refund. This is divided between cooperative members only – excluding investor's members and third parties – in proportion to the operations carried out between the member and the cooperative.

In practice, the situation differs markedly:

- Cooperatives of companies distribute their results extensively as patronage refund, because they focus on business between the cooperative and members. The patronage refund is a price supplement in economic terms.
- Open cooperatives, i.e., consumer cooperatives and credit unions, use this form of distribution very sparingly, although some of them are thinking about means of rehabilitating this approach.

An SCE can distribute patronage refund

b) Reserves which cannot be shared

Cooperatives in France consider reserves which cannot be shared as a constituent part of their identity. However, the legal system varies significantly depending on the articles of specific laws.

Only broad brushstrokes are provided here.

b1) Establishment of reserves

All cooperatives must endow a legal reserve each year from the surplus made amounting to 15% of the surplus until the reserve is equal to capital.

Thereafter, there are several systems applicable without any legal harmonisation.

- **In worker cooperatives**: the law refers to a development fund without stipulating the percentage which must be allocated. Worker cooperatives which have signed a participation agreement may set up a “provision for investment” equal to the amount granted to workers for the participation. This provision is considered a reserve.
- **In cooperatives regulated by the 20 July 1983 law** there must be a ‘reserved special account’ which cannot exceed twice the overall equity amount ever established less its own amount. In other words, increasing reserves makes it necessary to increase capital. Surpluses from operations carried out with non-members must also be allocated to indivisible reserves.
- **In agricultural cooperatives** in addition to the legal reserve referred to above there must also be a ‘reserve for cancelled shares’ funded with the difference between reimbursed shares and new shares taken out during a fiscal year. Surpluses from operatives carried out with non-members, reserves from a cooperative devolution and subsidies are also paid into indivisible reserves.
- **In other cooperatives (credit unions, consumer and retailer cooperatives),** apart from the legal reserve stated above, other reserves are included in the articles of statute or contracts in line with the equity ratios demanded by credit unions.

Article 18 of the 1947 law stipulates for all cooperatives the possibility of establishing a reserve intended to enhance the value of shares reimbursed to the cooperative member when leaving in order to offset monetary erosion. This measure is practically never used.

An SCE establishes a legal reserve at 15% of its annual surpluses and to the extent of the capital amount.

b2) Prohibition on sharing reserves

The prohibition means that it is impossible to generate a gain when reimbursing the member's shares and the notion of disinterested devolution when a cooperative is dissolved.

Principle and mitigating circumstances

French cooperative law remains broadly qualified by the principle prohibiting the sharing of reserves. The primary consequence is that it is theoretically impossible to increase the value of shares or access to 'free' shares by incorporating reserves.

Recent legislation has, however, attenuated the rigour of this principle to varying degrees:

Possibility of incorporating reserves as stipulated by the 10 September 1947 law

Article 16 of the law makes it possible for articles of association to allow the inclusion of half of the reserves in capital the first time and half by growth thereafter, which means either an increase in the nominal value of the cooperative share or a distribution of 'free cooperative shares'.

This measure applies to credit unions, retailer cooperatives and consumer cooperatives.

- For other cooperatives:

In contrast, neither cooperatives subject to the 20 July 1983 law nor workers' cooperatives can do this. The only possibility available to them is the article 18 option.

Agricultural cooperatives can incorporate a special re-assessment reserve or reserves without allocations in order to inject value in shares to the extent of the annuities scale. This decision requires an amendment to the articles of statutes via an extraordinary general meeting and is contingent on the drafting of a revision report.

For an SCE only the legal reserve cannot be shared in any way. Other reserves can be incorporated in equity to the extent of half of all reserves the first time and then 50% of their increase from subsequent operations.

b3) Devolution of net assets in the event of dissolution / winding down of the cooperative

Cooperative legislation in France stipulates devolution of net assets in the event of dissolution either to cooperatives or to general interest facilities (which can concern a sector, as in the case of agricultural cooperatives). There is an exception for retailer cooperatives. A ministerial decree can authorise an allocation of net assets between members after the *Conseil Supérieur de la Coopération* has ruled.

When dissolved, an SCE must devolve its net assets to other cooperatives or general interest (agricultural or professional) facilities.

6) Cooperative governance

Principle…

The principle reasserted by article 9 of the 10 September 1947 law is the rule of one person, one vote, which endows each member – be it legal entity or individual – equal rights in appointing executives at the annual general meeting.

And the exceptions:

There are two types of exception: those concerning member activity with the cooperative and those relating to capital ownership.

- **Exceptions concerning member activity** with the cooperative: article 9 of the 1947 law allows the incorporation articles of only cooperative unions to include the possibility of qualified voting depending on either the number of members or the turnover generated by the cooperation and the union. This possibility also exists for social economy unions.

Article L 524-4 of the rural code offers agricultural cooperatives the possibility of introducing qualified voting in their articles of statutes. Such weighting is dependent on the extent of business with the cooperative or on the nature of commitments. A single member may not have over 1/20th of the votes or two-fifths in cooperative unions. In practice, this system is used primarily in cooperative unions.

- **Exceptions concerning capital ownership:** these are stipulated in article 3 bis of the 1947 law which allows investor members a voting right in proportion to the shares but caps it at 33% of voting rights.

An SCE operates on the principle of one man, one vote. It cannot apply qualified voting unless it is a union of cooperatives or has granted proportional voting rights to investors members.

The most widespread governance system in France is that of a board of directors with a chairman and managing director. However, the management and supervisory board approach is possible in all cooperatives even though it is rarely used. An SCE may opt for one of the two systems.

- **External controls and cooperative auditing (revision)**

In addition to statutory checks on accounts, as is the case for all companies, cooperatives (or at least some of them) are subject to cooperative revision.

This applies to worker cooperatives, cooperatives subject to the 20 July 1983 law, agricultural cooperatives and cooperative societies of collective interest. The aim is to ensure at least that the cooperative operates according to cooperative principles.

In contrast, credit unions, consumer and retailer cooperatives are not subject to this requirement.

An SCE is subject to cooperative auditing (revision) only if in a specific category which must comply with the revision requirement.

7) Transformation of a cooperative company into another form of company

No cooperative company can lose its cooperative status unless decided by the ministry after a ruling by the *Conseil Supérieur de la Coopération*. This authorisation is possible only if the company requires it for survival or to expand.

To withdraw from cooperative status, an SCE must request ministerial approval or transfer its head office to another member State.

5. Tax system for cooperatives in France

5.1 Company tax

Cooperatives are subject to company tax. However, the law does allow consumer and worker cooperatives to deduct from their taxable results all amounts paid as rebates to their members. The tax authorities have extended this possibility to retailer cooperatives and mutual banks (which make little use of this option). The possibility is available only to cooperatives with a majority capital stake held by its cooperative members (and not investors members)

Exceptions : Other cooperatives: agricultural, crafts, maritime and carrier cooperatives have an exemption from corporate tax:

They are exempted from corporate tax – with regard only to operations with their members – provided that they operate in line with more stringent articles of association than open cooperatives. Operations with non-cooperative members may not exceed 20% of turnover and are subject to corporate tax. This exemption is revoked if investors members hold over 50% of the equity.

Social housing cooperatives are exempt as organisations with a social purpose.

Worker cooperatives can deduct from the taxable base the ‘labour share’ distributed to members.

For an SCE, only patronage refunds from operations which are taxable in France could be deducted from the corporate tax base, but provided that the tax authorities extend

instruction 4H2144 to SCEs. (This instruction extends the application of article 214-1 of the General Tax Code to cooperatives not stipulated by law.).

An administrative instruction – at least – would be required to extend to SCEs the option to deduct patronage refunds from their taxable results.

5.2 Regional economic contribution

Cooperatives are generally subject to regional economic contributions.

The following are, however, exempt:

- Worker cooperatives
- Craft and maritime cooperatives
- Some agricultural cooperatives (those with three or more employees, and specific activities close to agriculture: fruits and vegetables, animal insemination, wine cooperatives and agricultural equipment cooperatives)

Other agricultural cooperatives benefit from a half-base for the land parts of the regional economic contribution.

An SCE may not claim eligibility for specific measures without specific statutes being passed**.**

Conclusion

The transposition of the SCE rule into the law governing French cooperatives, even though done belatedly, has, all the same, not entailed any major legal upheaval, in any case at the level of the Law of 10 September 1947, but rather some adjustments that will require interpretation by practitioners and of the operating procedures for use.

One factor that is somewhat disconcerting to a French lawyer is the hierarchy of legal standards provided for in the rule. The fact is that those provisions lay down rules opposite to the ones of French law, in which special provisions constitute a departure from the general law. The article, on the contrary, assigns primacy to the rule, and then to the statutes when the rule authorizes this, and then to the transposition law, and finally to the national laws governing cooperatives.

This results in interpretations that are sometimes complex, as we will see below.

One important technical element is the issue of whether or not European cooperative companies come under the law of commercial companies, and hence the Code of Commerce. Article 8 of rule 1435/2003 does not provide for any such referral. This means that a European cooperative company – with respect to the provisions not covered by the rule, the provisions adopted for its application, the SCE articles of association, the

cooperative laws – shall have to be constituted like a company that is neither a “société anonyme” (public limited company) nor a limited liability company. This will no doubt give rise to a few legal uncertainties when the rule does not authorize any reference to the rules governing public limited companies.

The essential differences by comparison with Law of 10 September 1947 bear on:

- The minimum capital of 30 000€ for the SCE, instead of 18 500€ for a cooperative public limited company.
- A number of members coming to 5 individuals and legal entities in two member States or two legal entities in 2 member States, instead of 7 individuals or legal entities for a cooperative public limited company.
- The possibility of departing from exclusivism if the articles of association allow this, whereas the 1947 law completely rules this out, in the absence of provisions to the contrary in particular laws. This prohibition under the Law of 1947 should no doubt be done away with to make the law consistent with the SCE rules.
- The SCE investors members may hold a maximum of 25% of the voting rights against 33% for cooperatives under the 1947 law. French law will no doubt retain this greater flexibility.
- The system of the various classes of shares is similar, but not identical. Hence an SCE may issue:
- Shares paired with special advantages,
- Preferred shares without voting rights only if it has planned to call on investors members. On the other hand, those shares are not accessible to third parties who are not members,
- Cooperative investment certificates and/or participating securities.
- Concerning the indivisibility of the reserves: for the SCE, only the legal reserve cannot be shared out, and the text does not specify anything else. In the 1947 law, the principle is indivisibility, from which the cooperatives’ articles of association may depart within certain limits.
- The appropriation of earnings is also carried out in a different order: the text of the regulation is difficult to construe on this point, since article 65 establishes a hierarchy of the applicable laws differing from the one in article 8. Nevertheless, the rule provides, in the first place, for funding the legal reserve, but in the second place for distribution of refunds, and then funding of the reserves, and finally for the interest paid to the shares. Hence it emphasizes cooperative distribution over distribution of the capital. The 1947 law provides for funding the legal reserve, and then the interest paid to the cooperatives shares, and then the refund and the other reserves.
- The voting rule at general meetings is the principle of “one person-one vote” for the SCE, as well as for the cooperatives governed by the 1947 law, except for the investing members.
- The devolution of net assets must be to other cooperatives or general interest

works for the SCE and the cooperatives under the Law of 1947.

- As we see, the differences by comparison with the Law of 1947 are more a question of nuances than of fundamental differences.

However, the development of cooperatives in France has occurred within a legal framework consisting of numerous particular laws (cf. above), sometimes paired with specific taxation treatment. These developments have included the SCOP (workers' cooperatives), agricultural cooperatives, the cooperatives governed by the Law of 20 July 1983, etc., within their specific legal framework, but the Law of 1947 as such has been used only infrequently to date. But the SCE is attached, first of all, to the Law of 1947. This partitioning of the French cooperative legal framework, which is the result of history and has made substantial development of cooperatives possible in each economic sector, nevertheless reaches its technical limits when an economic project does not fall within the existing frameworks. Creation of the SCIC, a multi-partner cooperative company, had the objective, inter alia, of dealing with this problem. But the relative complexity of implementation thereof resulted in its slow development. This partitioning also impairs the readability of the cooperative form as a particular enterprise model distinct from commercial companies.

All the same, it is impossible for the near future to redo this construction, all the more so in that it has not impeded the relatively large-scale development of cooperatives in France, and the SCE will have to be part of and find its proper position in this landscape and in the legal tools used by cooperatives' senior managers. The need for upgrading knowledge of this tool remains the key to its use.

ANNEXE 1

Essential Bibliography

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GERMANY

By Hans-H. Münkner

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in German legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the SCEAG. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in German legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **3.13.** Literature on co-operative law in Europe. – **4.** The SCE Regulation and national law on cooperative societies. – **II.** Questionnaires. – **III.** Visibility of the cooperative sector. – List of abbreviations.

1. The Implementation of SCE Regulation 1435/2003 in German legislation

1.1 Source, time and modes of implementation

SCE Regulation 1435/2003 of the Council dated 22 July 2003 only contains a skeleton framework of the SCE which is supplemented by cross-references to the national co-operative laws of the EU Member States (Beuthien 2004, p. 1196).

To achieve the required transposition of the SCE-Regulation into German national law and to adjust the national legislation accordingly, a total of 19 laws and decrees had to be introduced or to be amended. To this effect an Act on the introduction of the European Co-operative Society and the amendment of the co-operative law (Gesetz zur Einführung der Europäischen Genossenschaft und zur Änderung Genossenschaftsrechts), Änderungsgesetz / Amendment Act, BGBl. I 2006, pp. 1911-1957; Schulze/Wiese 2006, pp. 108 ff.; Geschwandtner/Helios 2006, p. 18; Korte 2009, p. 735) was adopted by the Federal Parliament (Bundestag) on 14 August 2006 and came into force on 18 August 2006 (Article 21 of the Amendment Act). In this so called “Article Act” (Artikelgesetz) each Article contains a new law or provisions amending an existing law or decree.

Article 1 of the Amendment Act contains the law on the implementation of the SCE-Regulation 1435/2003 of the Council dated 22 July 2003 – SCE-Ausführungsgesetz (SCEAG) with 36 paragraphs and 2 paragraphs with transitory provisons.

Article 2 of the Amendment Act deals with the involvement of workers in a European co-operative society, SCE-Beteiligungsgesetz (SCEBG), implementing Directive 2003/72/EG of the Council, dated 22 July 2003, supplementing the SCE Regulation with regard to workers’ involvement. It is subdivided in five parts. Part 1: general provisions (§§ 1-3); Part

2: involvement of employees in an SCE formed by at least two legal persons or by conversion (§§ 4-39); Part 3: involvement of employees in an SCE formed by natural persons (§§ 40 and 41); Part 4: principles of collaboration and provisions protecting employees (§§ 42-46); Part 5: penal provisions, fines and final provisions (§§ 47-49).

Article 3 of the Amendment Act regulates the revision of the German Co-operative Societies Act, introducing some provisions of the SCE-Regulation into national co-operative law.

Article 4 of the Amendment Act supplements the Decree on the Register of Co-operative Societies (Verordnung über das Genossenschaftsregister, GenRegV) to accommodate provisions on registration of SCEs having their registered office in Germany. Further amendments were made for instance regarding the Commercial Code (Handelsgesetzbuch, HGB, Article 12 Amendment Act) and regarding the Conversion Act (Umwandlungsgesetz, UmwG, Article 14 Amendment Act).

1.2 Structure and main content of the SCEAG

With 38 sections the text of the SCEAG covers 9 pages. It is subdivided into seven parts:

Part 1 General provisions

- § 1 Field of application
- § 2 Control of formation process
- § 3 Registration
- § 4 Admission of investing members

Part 2 Formation of SCE by merger

- § 5 Disclosure requirements
- § 6 Auditors of merger
- § 7 Improvement of the share-exchange ratio of the subscribed capital
- § 8 Refusal by individual member
- § 9 Protection of creditors in case of merger

Part 3 Registered office and change of office

- § 10 Registered office and head office in different states
- § 11 Protection of creditors in case of change of registered office, Negativerklärung (i.e. declaration of the management or administrative organ of the SCE-D that there are no legally valid proceedings opposing the validity of the transfer of the registered office).

Part 4 Structure of the SCE

- *4.1 Two-tier system*
- § 12 Appointment of members of the management organ (Vorstand)
- § 13 Management by members of the supervisory organ (Aufsichtsrat)

§ 14 Number of members of the management organ
§ 15 Number of members and composition of the supervisory organ
§ 16 Right of individual members of the supervisory organ to be informed
4.2 One-tier system
§ 17 Application for registration
§ 18 Obligations and rights of the administrative organ (Verwaltungsrat)
§ 19 Number of members and composition of the administrative organ
§ 20 Removal of members of the administrative organ from office
§ 21 Diligence and responsibility of the administrative organ
§ 22 Managing directors
§ 23 Representation
§ 24 (cancelled)
§ 25 Contents of the letters and documents sent to third parties
§ 26 Application for registration and changes of composition
§ 27 Preparation, audit and decision on the annual report
4.3 General meeting
§ 28 Convocation by auditing federation
§ 29 Weighed voting
§ 30 Voting rights of investor members
§ 31 Sector and section meetings
Part 5 Annual return and management report
§ 32 Preparation of annual return and management report
§ 33 Making these documents public
§ 34 Audit
Part 6 Provisions on designated authorities, penal provisions and fines
§ 35 Designated authorities
§ 36 Penal provisions and fines
Part 7 Final provisions
§ 37 Transitory provision regarding the Act on modernisation of the law governing the preparation of balance sheets
§ 38 Transitory provision regarding the Act to implement the Directive on the rights of shareholders

The SCEAG contains all provisions which according to SCE Regulation 1435/2003 have to be made by the national law-makers of the EU-Member-States and gives SCEs formed in Germany autonomy to make by-laws (note: in this report the German word Satzung is translated as by-laws and not as statutes) as far as this is possible.

It contains provisions facilitating or promoting the formation of SCE's in Germany by regulating the powers of the designated public authorities for implementing SCE Regulation 1435/2003 and prescribes the obligation of the SCE-Ds to report to the

designated authorities and to the co-operative auditing federation in line with SCE Regulation 1435/2003 (Art. 78 paragraph 2 and Art. 71 SCE-Reg).

In principle, the SCEAG applies without restrictions to all types and fields of activity of registered co-operative societies, which – according to German law (§ 1 GenG) can be exercised by co-operatives, with the exception of organisations offering insurance services. However, the economic activities of SCEs have to be exercised across the borders of at least two EU Member States or EFTA States. This excludes to a large extent such co-operatives having by their nature activities which are locally rooted like primary agricultural co-operatives and housing co-operatives. Under German law, organisations offering insurance services cannot work in the legal form of registered co-operative society (eG) and accordingly also not in the legal form of SCE-D but have their own legal framework (Versicherungsverein auf Gegenseitigkeit, VVaG) with their own supervisory authority (Gesetz über die Beaufsichtigung von Versicherungsunternehmen, VAG dated 12 May, 1901 with amendments up to 30 July 2009). The reasons for this special treatment of the insurance business are considerations of variable share capital, risks and liability.

1.3 The designated Authority/ies as required by art. 78, par. 2 SCE-Reg.

The designated authority for registration of SCE-Ds, for keeping the register and for matters contained in Art. 7 paragraph 8, Articles 30 and 29 paragraph 2 as well as in Articles 30 and 73, paragraph 1 and 5 of SCE-Reg, is the court designated by § 10 GenG and § 23a, paragraphs 1 and 2 Nr. 4 of the law governing the structure and procedures of courts (Gerichtsverfassungsgesetz) in connection with § 376 of the law on proceedings in family matters and matters of non-contentious legal proceedings (Gesetz über das Verfahren in Familiensachen und in Angelegenheiten der Freiwilligen_Gerichtsbarkeit, FGG) as the respective “Registergericht” (court keeping the register of co-operative societies, § 35 SCEAG).

The designated authority for receiving applications according to Art. 73, paragraph 1 SCE-Reg. is the supreme state authority (State Minister of Economic Affaires) under § 63 GenG of the federal state in which the SCE-D has its registered office.

As far as supervision of the formation of SCE-Ds is concerned (§ 2 SCEAG), there are problems of delineation, because under the SCE-Reg company law shall apply (§§ 32-35 AktG, i.e. Companies Act) according to which an audit by independent auditors is required, while, unlike in § 33, paragraphs 3 and 4 AktG, the Co-operative Societies Act (GenG) in § 54 provides for an audit by an auditing federation, to which – according to Art. 71 SCE-Reg. – an SCE-D has to be affiliated.

The same discrepancy occurs regarding the registration, which under § 3 SCEAG has to be registered in the special register of co-operative societies according to the provisions

governing companies. As in the case of a German eG the SCE-D has to add to its application for registration a statement of a co-operative auditing federation certifying that the new SCE-D is admitted as a future member of the federation. The same rules apply in case of establishing an SCE-D by merger (§§ 5 and 6 SCEAG).

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2. A comment on the implementation of the SCE Regulation in German legislation

The deliberations to agree on a name for the European Co-operative Society mirrored the difficulties of the EU Member-States to agree on this complicated subject matter, in which the EU Member-States had very different experiences during their historic development. The German representatives for instance refused to accept the proposed abbreviation EuGen as unsuitable. Finally it was agreed that an abbreviation based on the latin name “Societas Cooperativa Europea” or SCE was acceptable for all member-states

After the transition period elapsed, SCE’s can be formed in Germany, since August 18, 2006. The SCE Regulation is directly applicable in Germany. However, because of the many options for choice given to the national law-makers, special rules for the implementation became necessary. To this effect, the Federal Ministry of Justice in collaboration with representatives of the German Co-operative Federations elaborated an agreement on the basis of which a law of implementation (SCEAG) was adopted and came into force on August 18, 2006.

It is hard to predict to what extent this new legal form for cross-border co-operation will be applied in Germany. There is an attractive alternative. The German Co-operative Societies Act allows German co-operative societies to admit foreign members (e. g. Intersport eG). It also remains to be seen to what extent SCEs formed in other EU Member-States will chose Germany for their registered office and for their by-laws.

In their comments on the SCE-D all experts agree that it is too early to come to a conclusion on the acceptance of the new European legal form for cross-border co-operation. However, the opinions differ, as can be seen from the way in which the new provisions on the SCE are dealt with in the leading commentaries on German co-operative law.

In the most recent edition of the commentary on the German Co-operative Societies Act by Lang-Weidmüller et al. close to practising co-operators (36th Edition 2008), the authors agreed that in Germany SCEs will not play an important role and decided not to include a special chapter of comments dealing with the provisions of the SEC Regulation and SCEAG. This is in line with the opinion of Schaffland, the long-time head of the legal department of DGRV, who has followed the entire process of making the SCE-Regulation and actively participated in drafting its final version. Schaffland holds the view that in Germany preference will be given to the possibility to establish co-operatives under German national law and to admit members from other countries. This will allow working on the well known territory of national law. The authors of the 36th edition of the commentary wrote: “Against this background we will refrain from discussing the individual provisions of the SCE-Regulation”. (Lang-Weidmüller 2008, p. 43). Therefore, the commentary only offers a summary of the contents of the SCE Regulation and its introduction into German law. In the comments on the individual provisions of the GenG,

short notes are added where appropriate concerning the respective articles of the SCE Regulation and the SCEAG.

However, this view has changed. In a recent statement, DGRV points out that this assessment was based on experience made in the years 2007/2008. Now that the DGRV is actively engaged in supporting the establishment of an SCE and has gained practical experience in drafting the by-laws of the planned SCE-D, this project may serve as the basis for future model by-laws of SCEs having their registered office in Germany. This change of mind will be considered when drafting the 37th edition of Lang-Weidmüller.

Beuthien, in the 14th Edition of his commentary on the German Co-operative Law, Berlin 2004, opted for a different approach. He mentions in the introduction that it is too early to predict what practical use will be made of the SCE-Regulation in Germany. However he presents a special chapter on the SCE (pp. 1192-1309) together with a special alphabetical index (Index II, pp. 1383-1387).

The following reasons are given for the limited interest that the SCE has found in Germany so far:

- Lack of need, mainly because there are less complicated alternatives to organise cross-border co-operation,
- Lack of knowledge of the SCE which is even less known than the eG, especially among founder members of team enterprises, business consultants, tax consultants, associations of entrepreneurs and chambers of crafts, trade and industry.
- The high complexity of the legal provisions with a hierarchy of norms covering five different levels and the options to deviate from the standard German norms.
- Higher minimum requirements regarding the contents of by-laws of SCEs as compared to eGs.

This complexity results from the incomplete legal framework offered by the SCE Regulation and the method of referring to the national law of the EU Member-State in which the SCE has its registered office. Art. 8 SCE-Reg. creates this hierarchy of norms with five different levels, which Beuthien (2004, Art. 8 SCE, RZ 1) summarises as follows:

- First level: Community law – as far as it reaches – prevailing over national law (Art. 8 paragraph 1, lit. a);
- Second level: As far as SCE Regulation expressly grants autonomy to make by-laws, these European by-laws replace the law of the EU Member States (Art. 8 paragraph 1, lit. b);
- Third level: At EU Member State level, as far as left open by the SCE Regulation, there is (a) special legislation introducing the SCE Regulation into national law (SCEAG) Art. 8 paragraph 1, lit. c, case i) and (b) the national Co-operative Societies Act (Art. 8 paragraph 1, lit. c, case ii);
- Fourth level: Co-operative law under the national legal system (Art. 8 paragraph 1, lit. c, case iii);
- Fifth level: By-laws made under national co-operative law.

The most recent publication on German co-operatives societies from the legal, tax and accounting perspective by Helios/Strieder Eds. (2009), contains a full chapter by Korte on "The European Co-operative Society" (Korte 2009, pp. 730-765), who gives the following simplified picture of the hierarchy of norms of article 8 paragraph 1 SCE Regulation (Korte (2009, p. 734):

Hierarchy of norms of article 8 paragraph 1 SCE Regulation (Korte 2009, p. 734)

lit a	SCE Regulation (including references to national law)
lit b	By-laws (according to the SCE Regulation)
lit c n° i	National law of application (in Germany: SCEAG)
lit c n° ii	National co-operative law
lit c n° iii	By-laws (according to the national co-operative law).

A good survey of the contents of the most important provisions of the SCE Regulation is given by Brockmeier (2007, pp. 848 ff.).

Special problems arise when drafting by-laws for SCE-Ds. The autonomy of the SCEs to make by-laws is restricted under Art. 8 paragraph 1, lit. b (in the same way as in § 18 paragraph 2 GenG) in order to protect members and creditors. This means that SCEs only have autonomy to make by-laws as far as the respective provisions of the SCE Regulation expressly permit. Such cases are for instance:

- Art. 1 paragraph 2 subparagraph 3 (liability of members),
- Art. 1 paragraph 4 (transactions with non-members),
- Art. 4 paragraph 1 subparagraph 2 (categories of members),
- Art. 4 paragraph 1 subparagraph 3 (nominal amount of share capital).

(Beuthien 2004, pp. 1222, 1223).

Because rules on the higher level of the hierarchy of norms replace rules made at lower levels, this complex norm hierarchy causes considerable consultancy fees when establishing a new SCE-D. When drafting by-laws for SCE-Ds many rules of the SCE Regulation have to be complied with. Their number by far exceeds the relatively few compulsory rules contained in §§ 6, 7 and 36 paragraph 1 GenG. Fiedler (2009, pp.135-137) enumerates 27 of such provisions. However, this assessment is not shared by DGRV. Experience gained while supporting a current project of transformation of an eG into an SCE shows that open legal questions should not only be seen as an impediment in the way of establishing new SCEs but rather as a chance to test and apply new approaches to solving legal problems. According to DGRV, the consultancy cost for establishing an SCE are not higher than those required in case of every other newly introduced legal form in which the law does not contain model by-laws.

The complexity of the SCE Regulation is increased further by reference to provisions of the national company law. For instance, according to Art. 17 SCE-Reg, establishing an

SCE-D is regulated by the German Co-operative Societies Act, while the registration of the SCE-D is done according to Art. 11 paragraph 1 SCE-Reg on the basis of company law. In its structure, the SCE-D can deviate from the structure of an eG by opting for the one-tier system of organisation instead of the standard two-tier system (Fiedler 2009, p. 133).

DGRV does not consider the SCE Regulation to be more complex than other laws governing business organisations and underlines the advantages which cross-references to national co-operative legislation have: closer relations to the legal environment of the other co-operative societies in the country in which the SCE has its registered office and use of model by-laws which are not too different from those of eGs under national co-operative law.

Opinions vary on the principle of self-government (Selbstorganschaft) laid down in § 9 paragraph 2 GenG, meaning that only members of the co-operative society are eligible to serve as elected office-holders. There is no such provision in the SCE Regulation. In Art. 58 paragraph 2 SCE-Reg, office holders are given a special right to attend the general meeting. This is considered by some authors as an indication that office-holders of an SCE need not to be members of the SCE. Fiedler (2009, p. 135) holds a different view with reference to Art. 46, paragraph 2 SCE Reg.

Another impediment in the way of establishing an SCE-D rather than opting for an eG are the rules on workers involvement. According to the SCE-Guideline on Workers Participation/SCEBG (SCE-Beteiligungsgesetz), all employees of the founder members have to participate, with the aim to find an agreement on workers' participation in the new SCE-D (§ 5 paragraph 1 SCE BG).

If an SCE-D is established by natural persons only, workers' participation becomes relevant only, if one of the founder members employs at least 50 workers (§ 41 paragraph 1 SCE BG). Until now there is no experience with workers' participation in SCE-Ds, because the only SCE-D registered until now does not need workers' participation (Fiedler 2009, p. 139).

The German law-makers made efforts to facilitate the establishment of SCEs in Germany by promulgating the SCEAG without much delay. However, by adjusting the German Co-operative Societies Act to the provisions of the SCE Regulation in the course of amending the German Co-operative Societies Act in 2006, new incentives were created for establishing German eGs for cross-border co-operation rather than for creating SCE-Ds.

The new provisions in the amended German Co-operative Societies Act 2006 include: extension of the objects of co-operative societies to include the promotion of social and cultural aspirations of the members, a reduced minimum number of members, admission of investor members, introduction of transferable shares, increased information and control rights of the supervisory organ, improved information of members, on-line general meetings and voting by electronic communication (Geschwandtner/Helios 2006, p. 18).

The SCE Regulation applies without restriction to all types of co-operatives and all fields of co-operative activities, which, according to § 1 GenG are open to German eGs. The only exception are organisations having as their object to offer insurance services. Such organisations are governed by a special law on the supervision of insurance enterprises (Gesetz über die Beaufsichtigung von Versicherungsunternehmen, VAG) of 12 May 1901 with amendments up to 30 July 2009. The reasons for this are the variable share capital of Co-operative societies as well as considerations of risks and liability.

After negotiations on a common legal basis for European Co-operative Societies lasting for almost half a century, agreement could only be reached because Member States, in which the conditions of co-operative development were totally different, were given many options to apply the SCE Regulation in such a way that it met the views which the national co-operative movements had of themselves. Gaps left in the SCE Regulation are to be filled by national co-operative law. This means that an SCE having its registered office in Germany could be approximated to a large extent to the German eG, while for instance an SCE registered in France would correspond to the laws and views prevailing there. It also means that there will be as many different SCEs as there are EU Member States.

In Germany, options granted to the national law-makers by the SCE Regulation were used according to the following guidelines:

- Focus is on the law of implementation of the SCE Regulation in Germany and not on the amendment of the German Cooperative Societies Act. This discussion will be held separately from the SCEAG.
- The provisions of the SCEAG shall not give SCE-Ds a competitive advantage to the detriment of the eG. No incentives will be given to cause an eG to transform itself into an SCE-D.
- Accordingly, provisions regarding financial instruments and a fixed minimum capital available to the SCE-D will simultaneously be made available to the eG.
- When making use of the options, it shall be taken into account that SCEs can also be formed in other EU Member States and that such SCEs could chose to have their registered office in Germany (EU Principle of freedom of establishment) (Lang-Weidmüller 2008, pp. 44, 45).

The two national co-operative apex organisations DGRV und des GdW emphasise that an agreement on a common European co-operative law was only possible by using the method of cross-references to national law and that this will also be the only realistic approach in the future.

Although it was expressly stated in the preamble of the SCE Regulation 2003 that harmonisation of national co-operative laws was not intended by the SCE Regulation, from a German point of view its provisions will contribute to level the typically co-operative profile of co-operative societies as a special legal pattern. The danger of losing co-operative substance in the by-laws and in practical application is growing.

DGRV and GdW have clear views on the pros and cons of harmonisation of national co-operative laws. Despite many common elements in the tradition of the European co-operative movements, there are also great differences in the view which co-operatives in the different Member States have of themselves and in national co-operative legislations. In their view, cross-references to national co-operative laws in the SCE Regulations are expressions of a political compromise, taking account of existing differences. This will not change in the foreseeable future (GdW). The main objective of the SCE Regulation is to maintain the essence of the co-operative idea: self-help, self responsibility and the de-emphasised role of capital. Co-operative identity has to be preserved at European level. If this goal can only be reached by cross-references in the SCE Regulation to national co-operative law, this has to be accepted. Full harmonisation of national co-operative laws is neither intended nor possible (DGRV).

According to DGRV, complexity of the SCE Regulation caused by numerous references to national co-operative laws is not too high. Usually, founder members will need the help of specialised consultants and advisers. Experience proves that the choice of a legal form for economic activities is more influenced by advice from (tax-) consultants than by the legal framework chosen (DGRV).

3. Overview of national co-operative law

3.1 Sources and legislation features

Following the tradition of Hermann Schulze-Delitzsch, co-operative societies in Germany are perceived as a special legal type of organisation governed by a special law applicable to all types of co-operative societies. In the system of the German law of organisations, co-operative societies can be classified as a special form of association with economic objectives (Paulick 1956, p. 5: an association of persons without a view to profit; Münkner 1993, p. 19: a hybrid type between association and partnership; Weber 1984: association with economic objectives). The German Co-operative Societies Act (GenG) applies to all types of co-operatives. Before the revision of the law in 2006, the most common types of co-operatives were enumerated in § 1 GenG.

The GenG was amended several times, mainly to adjust the legal provisions to the needs of large co-operative societies. This trend started in 1889 by introducing the option for limited liability of the members and by prescribing annual audit. It was continued in 1922 by introducing indirect democracy in the form of meetings of delegates in co-operative societies having more than 10,000 members. This number was reduced to 3,000 members in 1926 (§ 43a GenG). In addition, provisions were introduced for merger of co-operatives (initially §§ 63 a-d, later §§ 93a-s GenG) and regulating structure and tasks of co-operative auditing federations (initially §§ 60a-f, later 63c-i GenG). In 1933, unlimited

joint and several liability of members for the debts of the co-operative society was abolished. In 1934, the provisions concerning the keeping of books and accounts were amended and affiliation of each eG to a co-operative auditing federation was made compulsory (§ 53 GenG). Provisions regarding audit were revised.

Since 1954 consumer co-operatives and since 1973 also credit co-operatives are allowed to carry out transactions with non-members, if the by-laws so provide (§ 8 paragraph 1 n° 5 GenG; Beuthien 2004, § 8 RZ 10; abolition of § 8 paragraph 2 GenG). The amendments of 1973 introduced new rules strengthening the powers of the co-operative management organ (Vorstand, § 27 paragraph 1 GenG) and allowing co-operative societies to opt in their by-laws for members' liability limited by shares (§ 6 No. 3 GenG). Other new provisions dealt with the option to make members participate in the losses of a co-operative society (§ 87a GenG) and to allow departing members to claim part of a special reserve fund (§ 73 paragraph 3 GenG).

In 1985, the provisions on bookkeeping (§§ 33 ff. GenG) and audit (§§ 53 ff. GenG) were revised and adjusted to the EU-Guidelines for the harmonisation of the law of business organisations in the European Community. In 1994 the provisions governing co-operative audit were amended and redrafted to bring them in line with the law on control and transparency of enterprises (KonTraG). §§ 63e-i GenG were deleted as well as the provisions governing merger of co-operatives (§§ 93a-s GenG) which were replaced by article 7 of the Conversion Act of 1994. As part of the adjustment of German law to the EuroBilG in 2001, quality control was introduced for co-operative auditing federations in the form of a Peer-Review (§§ 63e-g and 64a-c GenG) adjusting it to the regulations concerning chartered accountants (Wirtschaftsprüferordnung, WPO). In the revision of the Co-operative Societies Act of 2006, the rules safeguarding the neutrality of co-operative auditors were strengthened (§ 55 GenG).

All these amendments have made the Co-operative Societies Act more detailed and more complicated, with a one-sided focus on the needs of large co-operatives and on approximating co-operative law to company law. This raises the question whether the Co-operative Societies Act in its current form can also be the legal framework for new and small co-operatives and innovative fields of co-operative organisation (Beuthien 1999, p. 8 ff.). Despite growing autonomy to make by-laws, Beuthien deplores that general provisions applicable to all co-operatives do not leave individual co-operatives sufficient autonomy to adopt by-laws suitable to their needs (Beuthien 2004, p. xliv).

In 1973, when the co-operative law was adjusted to the requirements of large co-operatives, Schnorr von Carolsfeld asked (ZfgG 1973, pp. 10, 17 and 27) whether there would not be need for a special law for small co-operative societies. At that time, this call remained unheard, while in other EU Member States (France and Italy) special provisions or special laws for small co-operatives already exist for many years.

As a result of mergers, the total number of eGs is decreasing continuously, leading to the fear that the legitimacy for having its own legal form would also decrease.

Geschwandtner/Helios (2008, p. 23) mention several reasons why the need of a special co-operative legislation could be called into question: “Decreasing number, together with problems of image, visibility, communication and assistance in establishing new co-operatives”.

After propagating concentration and growth by merger for decades, co-operative auditing federations have changed their view and developed special strategies for the formation of new co-operatives and for opening new fields of activity for co-operative organisations: Health care and co-operatives of medical doctors, communal tasks, co-operative use of alternative energy, self-managed village stores etc.

The amendment of the Co-operative Societies Act in 2006 did not only aim at adjusting the German co-operative law to the provisions of the SCE Regulation, but also to adjust the law to the needs of new and small co-operatives by introducing the following provisions:

- Broadening the objects of co-operative societies to include the promotion of social and cultural aspirations of the members (§ 1 paragraph 1 GenG);
- Reducing the minimum number of members from seven to three (§ 3 GenG);
- Facilitating the formation of new societies by allowing contributions in kind (§ 7a paragraph 3 GenG);
- Reducing the organisation cost by allowing co-operative societies with not more than 20 members to operate with a one-person management organ and without a supervisory organ (§§ 24 paragraph 2 and 9 paragraph 1 GenG);
- Reduction of audit cost by allowing small co-operatives with a balance sheet total of less than 1 Mio. €, and an annual turnover of less than 2 Mio. € to have a simplified audit (§ 53 paragraph 2 GenG).

The Co-operative Societies Act is supplemented by provisions contained in the Commercial Code (Handelsgesetzbuch, HGB), Law on Workers Co-determination, Transformation Law, KonTraG, competition law, tax law and for co-operative banks the Banking Act (KWG).

Reduction of the minimum number of founder members to three will certainly facilitate formation of new co-operative societies However, in most cases the objects pursued by a co-operative society can only be achieved if a larger number of people co-operate. Therefore, a larger number of founder members may already be required at the foundation meeting if the new co-operative is to become viable. Only in case of workers’ productive co-operatives and small self-managed firms or co-operatives formed by members of the liberal professions or by specialised service providers, small membership groups can work successfully in the legal form of registered co-operative society. Many of the new provisions introduced by the co-operative law reform of 2006 are addressed to such small co-operative groups.

Regarding the intended reduction of the cost of audit, this aim obviously has not been achieved. According to Bösche (2009, p. 41) exempting small co-operatives from audit of

their annual return is a wrong concept and means to save at the wrong end. Management audit which is prescribed also for small co-operative societies has always to go back to the data contained in the annual return, which unavoidably has to be included in the management audit. Therefore, this „simplified“ audit of small co-operatives results in only insignificant savings of audit cost. According to estimates, such savings may amount to only 20 percent of the normal audit cost (Höhfeld 2009, S. 9, 10). However, GdW underlines that the average audit cost is already relatively low so that the savings necessarily are small as well.

Despite its more than 20.4 Mio members, the German co-operative movement remains relatively unknown, especially among consulting professionals. Usually, co-operative subjects are not included in the curricula of trade schools, technical high schools and universities.

3.2 Definition and aim of cooperatives

Before 2006, § 1 GenG had the following text:

Definition and types of co-operative societies

(1) Societies with a variable number of members, with the purpose of promoting their members' activities in trade and industry by means of a commonly owned enterprise (co-operative societies), namely

1. loan and credit associations,
2. commodity associations,
3. associations established for the joint sale of agricultural or industrial products (marketing co-operatives, warehousing associations),
4. associations established for the joint production of goods and the sale thereof on common account (producers' co-operatives),
5. associations established for joint purchase of victuals or commodities on a large and discounting on a small scale (consumer co-operatives),
6. associations established for procuring objects for agricultural or industrial purposes and use thereof on common account,
7. associations established for the purpose of building houses,

acquire the legal status of a "registered co-operative society " according to this Act.

(2) Membership of societies and other associations, including bodies incorporated under pubic law, is admissible if and when they are intended to

1. promote the trading and industrial activities of the members of the co-operative society or,
2. serve the non-profit making activities of the co-operative society, without this being the sole or principal object of the society.

After the revision of the Co-operative Societies Act in 2006 the new text of § 1 GenG is as follows:

The nature of co-operative societies

Subsection 1:

Societies with a variable number of members, which have as their object to promote the income or economy of their members *or their social or cultural needs/aspirations* by means of a jointly owned and operated enterprise (co-operative societies), acquire the legal status of a "registered co-operative society " according to this Act.

Subsection 2:

Participation in societies or other organisations of persons including corporations under public law is permitted, provided that it serves

1. promotion of the income or economy of their members *or their social or cultural needs/aspirations.(…).*

The essential distinctive feature of co-operative societies is their object of furthering and supporting the activities of their members (member-promotion). To understand this feature in the German context it is important to distinguish between different types of transactions of co-operative societies:

Purpose transactions (Zweckgeschäft), i.e. transactions with members in the field for which the co-operative society was formed.

Counter-transactions (Gegengeschäft), i.e. transactions necessary to make purpose transactions possible, e.g. in case of consumer co-operatives, purchasing goods from wholesalers or producers in order to sell them to members; in case of marketing co-operatives, selling the products of the members to wholesalers. Such counter-transactions are by their nature usually **transactions with non-members in a broader sense** and are not relevant in the discussion of whether or not business with non-members is allowed.

Only purpose transactions with non-members are classified as **business with non-members in the narrow sense**. Such business with non-members is against the co-operative principle of identity of owners and users and prohibited, unless expressly allowed in the by-laws (§ 5, paragraph 1 n° 5 GenG).

3.3 Activity

In Germany, co-operative societies are allowed to operate in all fields of human endeavour with the exception of insurance services, for which a special legal form is provided (Mutual insurance association / Versicherungsverein auf Gegenseitigkeit, VVaG).

3.4 Forms and modes of setting-up

Formation procedures of co-operative societies are regulated under German co-operative law in a special way. A minimum number of founder members is prescribed, which was reduced by the co-operative law revision of 2006 from seven to three. Another special feature is the role of co-operative auditing federations in the formation process. The law provides for a special audit of the formation process (pre-registration audit). In addition it is required that together with their application for registration the founder-members present a certificate of the auditing federation that upon registration the new co-operative society will be admitted to membership in the federation (§ 11 paragraph 2 No. 3 GenG), as well as a written opinion of the federation on the formation process.

Critics of compulsory membership of eGs in a co-operative auditing federation and of the monopoly of co-operative auditing federations to carry out the audit of eGs see these procedures and their cost as the main obstacle in the way of formation of new co-operative societies (e.g. Bösche 2009).

GdW underlines the positive effects of co-operative audit. Support of founder members of new co-operative societies during their formative stage allows young co-operatives to build on solid ground. In case of other legal forms, especially in case of limited liability companies (GmbHs), a large number of newly established firms becomes insolvent soon after registration and disappears from the market. For many years, the share of co-operatives in the total of insolvencies of firms is marginal and according to official statistics for 2009 was 0.5 per thousand.

3.5 Membership

The reduction of the minimum number of members in the revision of the Co-operative Societies Act of 2006 from seven to three has already been discussed. A general requirement for membership in a co-operative society is to have full legal capacity. Further requirements can be laid down in the by-laws (e.g. residence in the society's area of operation, exercise of a certain profession). Conditions discriminating against prospective members are prohibited.

The original idea that all members are equal is not fully implemented in practice. There are "promoting members" (Fördermitglieder), which do not come from the typical membership group but rather join the co-operative society in order to become eligible as office-holders. There are passive members, who do not use the services of the co-operative enterprise any more. Since the revision of the Co-operative Societies Act in 2006, "investor members" can be admitted, who participate in the share capital but do not or cannot use the services of the co-operative enterprise. Compared with using members, investing members are given a weaker role in the organisation. It is safeguarded by

several provisions of the law that using members cannot be outvoted by investing members, for instance in the supervisory organ or in decisions to amend the by-laws of the co-operative society (§ 8 paragraph 2 GenG).

Membership can be acquired in various ways, as a founder-member by registration of the new co-operative society, by application for membership and its approval by the management organ (Vorstand), by inheritance, which – before the revision of the Co-operative Societies Act in 2006 – was only possible up to the end of the current financial year and can now be continued without time limit, if the by-laws allow, provided the new member is meeting the requirements for membership (§ 77 paragraph. 2 GenG) and in case of merger (§ 20, paragraph 1 No. 3 UmwG; Beuthien 2004, §§ 2 UmwG, RZ 68, pp. 1065, 1066).

Membership can be terminated by giving notice within the prescribed period of notice. According to § 65 GenG the minimum period of notice is three months before the end of the financial year and since 1973 the maximum period to be laid down in the by-laws is five years. However, according to § 65 paragraph 2 GenG revised in 2006, the period of notice can be extended to a maximum of ten years in co-operative societies mainly composed of entrepreneurs. Where the period of notice is two years or more, a member has an extraordinary right to terminate membership, if personal or economic reasons require (§ 65 paragraph 2). Furthermore membership is terminated if the personal requirements for membership are no longer met by the member (§ 67 GenG), by death of the member (§ 77 paragraph 1 GenG), by expulsion as laid down in the by-laws and in a fair and just procedure (§ 68 GenG; Beuthien 2004, § 68 GenG RZ 14, pp. 788-789) and finally by refusal to accept the conditions for continuation of membership in case of merger (Beuthien 2004, §§ 2 UmwG ff., RZ 69, p. 1066).

3.6 Financial profiles

Since 1973, most of the amendments of the Co-operative Societies Act have affected the financial profile of co-operative societies. The originally clear and simple financial structure of the co-operative society as a promotion-oriented organisation has become increasingly complicated by introducing additions and exceptions following the company model. In this way attempts were made to overcome “structural weaknesses” of eGs in the field of financing, even if this meant to level the typically co-operative profile and to lose co-operative substance.

Unlike the SCE Regulation the German Co-operative Societies Act did not provide for a minimum initial capital of the eG until 2006. By the revision of the Co-operative Societies Act in 2006 co-operative societies may introduce a fixed minimum capital in their by-laws and thereby give up the characteristic feature of a “variable share capital” (§ 8a GenG).

The decision on the allocation of annual surplus is taken by the members in general meeting. After revision of the Co-operative Societies Act in 1973, co-operatives can not only pay dividend on paid-up share capital but also interest, provided a surplus was earned in the current financial year or provisions have been made (§ 21a GenG). The law does not set any limits to dividend or interest on share capital. The typically co-operative way of allocation of surplus to members in form of patronage refund in proportion to use made of the services and facilities of the co-operative enterprise is not expressly regulated in the Co-operative Societies Act (Beuthien 2004, § 19 RZ 14, pp. 304, 305), but can be provided for in the by-laws and is decided by the management organ. On certain conditions co-operative patronage refund is recognised by the fiscal authorities as part of tax deductible operating cost and as a correction of the price in retrospect (Helios/Weber 2006, p. 212.).

Originally, the reserves of co-operative societies were strictly indivisible. In the revision of the Co-operative Societies Act in 1973, co-operative societies were empowered to make by-laws allowing co-operatives to establish a special reserve funds from which departing members could claim a portion on certain conditions. So far, this power allowing to turn part of their reserves variable is rarely applied by eGs. Mainly co-operative banks have developed a practice of issuing a special type of non-voting certificates (Genussrechte).

The allocation of remaining assets after liquidation is left to be regulated in the by-laws. The decision on distribution of liquidated assets is left to the members. If the remaining net assets are not given to a natural or legal person to be used for a specific purpose, the assets are transferred to the community in which the co-operative society has its registered office. The proceeds of such funds have to be used for purposes of general interest (§ 91 paragraph 3 GenG).

As far as the obligation of co-operative societies to keep books and accounts and to report are concerned, the provisions for co-operatives have been approximated to those for companies, a trend reinforced by efforts of the EU to harmonise commercial law in this field. The special provisions of § 33 a-i GenG were replaced in 1986 by reference to the commercial code (BilRGes, §§ 238-263 HGB) applicable to all businessmen (Beuthien 2004, vor § 33 RZ 1, p. 412). Registered co-operative societies have to report to the auditing federation to which they are affiliated, to the court keeping the register and to the fiscal authorities.

3.7 Organisational profiles

The general meeting of members or meeting of delegates is the supreme authority in the co-operative society. The general meeting of members / meeting of delegates decides all important matters concerning the working and existence of the co-operative society: amendment of by-laws (§ 16, paragraph 1 GenG), election of members of the supervisory

committee (§ 36, paragraph 1 GenG), decision on annual return and allocation of annual surplus (§ 48, paragraph 1 GenG), merger (§ 13, paragraph 1 UmwG); conversion (§ 193, paragraph 1 UmwG) and dissolution (§ 78, paragraph 1 GenG). In the by-laws of primary co-operative societies, election of board members is usually delegated to the supervisory committee. Since the amendment of the Co-operative Societies Act in 1973, board members manage the affairs of the co-operative society in their own responsibility and are only bound by the by-laws (§ 27, paragraph 1 GenG).

Since the revision of the Co-operative Societies Act of 1973, deviations are admitted from the originally strictly applied democratic principle of “one member – one vote”. However, weighed voting is restricted to a maximum of three votes per member (§ 43 paragraph 3 No.1 GenG) and the additional votes do not count in decisions requiring a majority of three quarters or more of the votes cast (e.g. for important decisions like amendment of by-laws, merger, dissolution, § 43 paragraph 3 No. 1 GenG). Since the revision of the Co-operative Societies Act in 2006, co-operative societies mainly formed by entrepreneurs may allocate a maximum of one tenth of all votes present in the general meeting to individual members (§ 43 paragraph 3 N°. 2 GenG). Details have to be laid down in the by-laws.

The rights of members and of the general meeting are strengthened by the amendments of the Co-operative Societies Act in 2006. According to § 43a paragraph 1 in co-operative societies with more than 1,500 members, in which the general meeting has been replaced by a meeting of delegates, the by-laws may prescribe that certain important decisions are reserved for the general meeting. Furthermore, minority rights of members are better protected. At least one tenth of the members or such smaller number as prescribed by the by-laws can call a general meeting to decide to return to the general meeting (direct democracy) and to replace the meeting of delegates (indirect democracy) by a decision of the general meeting (§ 43 paragraph 7 GenG). Information rights of members have also been strengthened (§ 47 paragraph 4 GenG).

German co-operative societies have to apply the two-tier system with a clear division of management (Vorstand) and supervision (Aufsichtsrat). The principle of self-administration (Selbstorganschaft, i.e. allowing only members of the co-operative society to be elected as office-holders) continues to be valid at least in a formal sense, while being circumvented in practice by admitting “promoting members”, who acquire membership in order to become eligible. The revision of the Co-operative Societies Act of 2006 allows for the first time that small co-operative societies with not more than 20 members may chose to work with a simplified organisational structure: A one-person administrative organ and no supervisory organ, the role of which is taken over by a representative of the members or by the general meeting (§ 9 paragraph 1 GenG). It is hoped that this reform will be advantageous for the formation of new enterprises in the legal form of eG.

Traditionally, under German co-operative law the supervisory function is carried out on two levels. Internal supervision is the task of the supervisory organ, which is given the

required rights to be informed and to act. External supervision is carried out by a co-operative auditing federation, which uses specially trained co-operative auditors, who in turn work closely together with the supervisory organ. Unlike in companies, the audit by co-operative auditing federations includes assessment of the performance of the directors with regard to fulfilling their task of member-promotion (performance audit cum advice, Beuthien 2004, § 53, RZ 5; Geschwandtner/Helios 2006, p. 151).

Strengthened by efforts of the EU to harmonise the provisions of national commercial codes, there is a trend to approximate co-operative audit to company audit. While originally co-operative auditors received special training to qualify them for their specific task, today the auditing federations encourage their auditors to acquire additional qualification as chartered accountant. Furthermore, as a rule at least one member of the management organ of a co-operative auditing federation has to be a chartered accountant (Beuthien 2004, § 55 RZ 4).

3.8 Registration and control

According to § 1 of the regulations on the co-operative register (GenRegV), co-operative societies are registered in a specific register of co-operatives (Genossenschaftsregister). Designation of the competent court and procedures follow the rules of the register of commercial enterprises (Handelsregister). According to § 3 GenRegV all concerned have to be informed of every entry in the register and the important entries are also published in the Official Gazette (§ 5 GenRegV). A separate file is kept for every registered co-operative. Matters to be entered into the register include: by-laws and amendments of by-laws, branch offices, election and removal of members of the management organ (directors), power of proxy, liquidators, dissolution of the co-operative society, continuation of a co-operative society, transformation of a co-operative society, decisions of a general meeting declared void and cancellation of a firm name (§ 6 paragraph 2 GenRegV). Important entries in the register are made on application of all members of the management organ.

External supervision of eGs has been delegated to a large extent from the state to co-operative auditing federations, which in turn are supervised by the competent ministry. To carry out their audit functions co-operative auditing federations need an audit license (§ 54 paragraph 1 GenG), which is only granted if the federation has a solid financial basis (§ 63a, paragraph 1 GenG). The audit license can be withdrawn. Government supervision of co-operative societies is reduced to control of pursuance of the specific co-operative objective of member-promotion. An eG following other objectives (e.g. profit making for payment of dividend to shareholders, “Dividend Co-operative” or a co-operative society working only as a holding society while all business activities are outsourced, “Holding Co-operative”) may be dissolved ex-officio (§ 81 GenG), which, however, rarely happens in

practice. Sanctions against co-operative societies for activities in infringement of the by-laws and procedures to be followed in case of insolvency are governed by the general provisions of the law of organisations.

3.9 Transformation and conversion

Before promulgation of the conversion (Umwandlungsgesetz, UmwG) in 1994, which came into force on January 1, 1995, conversion of a eG into a company as well as merger of co-operative societies and of co-operative auditing federations were regulated partly in the Co-operative Societies Act (1922: §§ 93 a-d; 1993: §§ 93 a-s GenG) and partly in other laws. To simplify these procedures and their practical application, the UmwG was made as a general law governing transformation by merger, splitting-up and conversion of organisations irrespective of their legal form. Co-operatives are free to merge with other organisations or to convert into a company or limited partnership and vice versa (Beuthien 2004, § 1 UmwG, RZ 6).

In case of eGs, transformation procedures require decisions of the general meeting with a majority of at least three quarters of the votes cast. There are no general rules of quorum (i.e. only the votes of members present and voting are counted). However, the by-laws may prescribe additional requirements: a quorum and/or voting at two consecutive meetings (Beuthien 2004, §§ 2 ff. UmwG, RZ 36). In this way, demutualization of co-operatives can be made more difficult.

3.10 Specific tax treatment

With growing size and increasing economisation of co-operative societies and their enterprises, the reasons for offering a special tax regime disappeared. Today, German co-operatives being perceived as incorporated business organisations are taxed like any other enterprise, with one important exception. According to judgements of the highest financial courts, surplus distributed among the members at the end of a financial year as patronage refund (Rückvergütung) is recognised as tax-deductible operating cost of the co-operative enterprise, provided that certain conditions are met: The surplus has to be earned in transactions with the members (hence separate books have to be kept for business with members and with non-member customers). Surplus distribution has to be calculated for all members or groups of members in the same way. Amounts due for distribution have to be actually paid out to the members (Helios/Weber 2006, p. 211).

When offering members of co-operative societies special conditions as compared with non-member customers, this principle is not recognised by the fiscal authorities as clearly as that of tax-deductible patronage refund at the end of the financial year. Although the

only difference between special conditions for members – as service near cost made available immediately at the time of purchase – and correction of the price in retrospect at the end of the financial year in form of patronage refund, is the time of price calculation, special conditions exclusively for members are seen by many (especially by competitors) as hidden profit distribution which is subject to tax (Beuthien 2004, § 1 RZ 148, p. 121; Helios / Weber 2006, pp. 217 ff.). Tax treatment according to the laws of the Member State in which the SCE has its registered office means that this question will be considered when selecting the Member State in which to register the SCE (DGRV).

3.11 Existing draft proposing new legislation

The last amendment of the German Co-operative Societies Act was made in 2006. Therefore, many authors hold the view that there will be no further revisions of the law in the near future. A proposal by Bösche to offer a special legal form for small co-operatives in a law for a “cooperation society, limited” (Kooperativgesellschaft, haftungsbeschränkt, Höhfeld 2009, S. 7) is unlikely to find much interest, because the 2006 revision contains for the first time special provisions for small co-operatives even though some of these new provisions (with regard to the cost of audit) may not have the expected results.

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run in the same direction, the world would turn over"), Prof. Dr. Rolf Steding zum 70. Geburtstag, Berliner Beiträge zu Genossenschaftswesen 67, Berlin 2007, pp. 93-116.

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4. The SCE Regulation and national law on cooperative societies

The essential difference between the SCE Regulation and the German Co-operative Societies Act is the high complexity of the SCE Regulation with its hierarchy of norms covering five levels (see supra, chapter 2), which have to be taken into account by the founder-members of SCEs and will cause high consultancy fees. Compared with the eG, it is particularly difficult to draft by-laws for SCEs, because a number of provisions of the SCE Regulation have to be taken into account, which by far exceeds the few provisions to this effect contained in the German Co-operative Societies Act (§§ 6, 7 and 36 paragraph 1 GenG). Fiedler counts 27 of such provisions in the SCE-Regulation (Fiedler 2009, pp. 135-137).

Another difficulty is created by the autonomy of SCEs of making by-laws, exceeding the autonomy granted to eGs and allowing deviation from German co-operative law and from the model by-laws for eGs made by the co-operative auditing federations. Examples are the right to choose the one-tier system of organisation, the requirement to have a fixed minimum capital and the right to use special financial instruments, choices which the national co-operative law does not offer. According to DGRV such difficulties are not SCE-specific but always occur, where a new legal form is introduced, experience with applying this new form has still to be gained and the law does not contain model by-laws.

An important element of the formation process of an SCE-D is employees' involvement. According to SCEBG based on the EU Directive on employees' involvement the employees of the founder members have to participate in the formation process with the aim to find an agreement on employees' involvement in the new SCE (§ 5 SCEBG). If an SCE is formed exclusively by natural persons, employees' involvement only applies if one of the founder members employs at least 50 workers (§ 41 paragraph 1 SCEBG). Until now no experience has been gained with employees' involvement in SCE-Ds because the only SCE-D existing so far does not require employees' involvement (Fiedler 2009, p. 139).

SCEs having their registered office in Germany (SCE-D) have to be affiliated to a co-operative auditing federation with the monopoly to carry out audit of SCE-Ds. Accordingly the SCE-Ds are confronted with the same cost regarding formation and operation which eGs have to bear. With the exception of insurance services, SCE-Ds can exercise their activities in all fields of human endeavour.

Obstacles in the way of forming new eGs, identified by co-operative federations and by many authors also apply to SCE-Ds. One of these obstacles is limited knowledge of the eG and SCE as a form of organisation and as a special legal pattern among founder-members of new enterprises, business consultants, lawyers, tax consultants, business associations and chambers of crafts, trade and industry.

While in the past several years co-operative federations have launched programs for propagating and supporting the formation of new eGs, such strategies in favour of SCE-Ds are still lacking. The complexity of the legal form of SCE-D already discussed earlier, adds to these problems.

DGRV sees as the principal object of the SCE Regulation to offer co-operative enterprises a uniform trans-national legal form for long-term cross-border co-operation, which at the same time takes account of the specificities of national co-operative law. By its decision that incorporation of organisations under the law of one Member State have to be recognised by the other Member States, the European Court of Justice has reduced the need for SCEs. The awareness of the chances offered by the European single market to enterprises in general and to co-operatives in particular has not reached the level hoped for by the EU authorities. This process will take time. It would therefore by premature to call the usefulness of the SCE Regulation into question.

II Questionnaire

The questionnaires provided by the SCE-Project in English were translated into German. A total of 26 questionnaires were sent in early December 2009 to the six German co-operative apex organisations (DGRV, BVR, DRV, ZGV, ZdK and GdW) and to several regional federations, co-operative training centres and the German Central Co-operative Bank (DZ BANK AG) as well as to 8 Institutes for Co-operative Studies at the universities of Berlin, Giessen, Erlangen-Nürnberg, Hamburg, Hohenheim, Cologne, Marburg and Münster.

Most of the questionnaires sent to co-operative institutions were answered jointly by the DGRV on behalf of four national apex organisations and five individuals, after consultation at national level. One national federation (ZdK), two regional federations (Mitteldeutscher Genossenschaftsverband and Genossenschaftsverband Weser-Ems), and DZ BANK AG sent their own answers. The Institutes for Co-operative Studies sent very short replies.

Questionnaires were also sent to the only SCE-D registered in Fritzlar and two other organisations planning to establish SCEs. The only SCE-D with a registered office and head office in Germany is located in Bad Wildungen and registered as an SCE by the competent local court (Amtsgericht) in Fritzlar. Its name is European Audit Institute Wellness & Spa SCE, its registration number on the register for co-operative societies is GnR 711, registered on 24 November 2008. The SCE-D was formed by seven natural persons from Germany, Austria and Switzerland and has as its object audit and certification of medical facilities and hotels offering wellness and spa services. It is a small enterprise of service providers with an initial capital of € 30,000 and a turnover in 2009 of less than € 15,000. The SCE-D is affiliated to the regional auditing federation Genossenschaftsverband e.V. Neu-Isenburg.

There are two other known initiatives to form more SCE-Ds or join new SCEs. Contacts to these initiatives have been established. One is Netfutura GmbH & CO KG for information management with its registered office in Saarbrücken, which plans to form a SCE with a partner organisation from Luxembourg. For details see: (http://www.netfutura.eu/runtime/cms.run/doc/Deutsch/249/Entwicklungsplanung.html) The other is ABG eG (Society for incasso services and advice of dentists) in Munich, planning cross-border activities with Austrian counterparts.

III Visibility of the cooperative sector

1. Measures to promote cooperative development

Considering the decreasing number of eGs mainly due to merger even though with a growing number of members (1980: 11,631 eGs with 13.2 Mio. members; 2008: 7,491 eGs with 20.4 Mio. members; Stappel 2009, pp. 42-43), cooperative federations increased their efforts to encourage and support the formation of new co-operatives. The merger-strategies of the 1990s of “Uniting Forces” – “One market – one co-operative” were replaced by new strategies focussing on “Membership as a unique feature” presented as an advantage of bringing about close customer relations, which the competitors cannot imitate (e.g. Bankinformation 11/2008). Another strategy is to present “14 strengths of co-operatives” which allow sustainable development.

The relatively good performance of co-operative societies in coping with the financial crisis is used to underline the strength of co-operatives, being locally rooted, taking responsibility for promoting local enterprises, with closeness to members and decentralised decision-making structures while being at the same time part of a strong integrated system of co-operative enterprises.

New media are used increasingly to promote the co-operative idea and to disseminate knowledge on co-operation along co-operative lines. For instance, successful new co-

operatives are presented in the internet (www.neuegenossenschaften.de), on CD-ROM (guide for persons interested in co-operatives) and in the co-operative press. Together with the presentation of new fields of co-operative activities, guidelines for founder-members, textbooks and self-study materials are published, e.g. a guide for founder-members of co-operatives of medical doctors, for co-operative use of alternative energy, for establishing co-operative village stores and a text for craftsmen's co-operatives. Recent textbooks and self-study manuals were published by the Institute for Co-operative Studies at the University of Marburg with the title "Member-promotion management in Co-operative Banks" (Mitglieder-Fördermanagement in Genossenschaftsbanken), elaborated by Beuthien, Hanrath and Weber together with the regional co-operative federation in Neu-Isenburg. Another textbook and self-study manual with the title "Our Co-op ● Idea – Mission – Achievements" was written by three experts of co-operation (Grosskopf / Münkner / Ringle) and published by the co-operative publishing house DG-Verlag, Wiesbaden with a preface of the presidents of DGRV, BVR and GdW, recommending the text to practising co-operators. The book is designed for all those working in co-operative societies. An English translation is also available. (Grosskopf/Münkner/Ringle: Our Co-op ● Idea – Mission – Achievements, Spak AG Bücher, Neu-Ulm 2009). Special efforts to attract young persons to co-operative societies include an apprentice programme, school co-operatives as well as special degree courses for managers of housing co-operatives, savings institutions of housing co-operatives and co-operative banks recognised by BaFin, the supervisory authority for banks, as qualifying for the position of bank manager (GdW). Special programmes for young persons and students are also offered by the member federations of DGRV, by a rich choice of courses at the co-operative academies and in the new media.

A problem which still remains to be solved is the absence of the co-operative form of organisation and legal pattern as a subject matter in vocational training, in trade schools, technical high schools and universities. In the curricula of faculties of economics and law, new forms of economic co-operation find increasing interest of professors, research workers and students, while, as a rule, co-operative studies are excluded and mentioned mainly as organisations of the past. Hence, while new forms of economic co-operation of enterprises like networks, strategic alliances, franchising and joint ventures are taught and learned, the co-operative society as the original type of economic co-operation is mostly omitted. Despite the existence of nine institutes for co-operative studies, which are united in a working group of institutes for co-operative research (AGI) in the legal form of an association, with sister organisations in Austria and Switzerland, publishing their own scientific quarterly (ZfgG) for the last 50 years, lectures on co-operative subject matters in the curricula and the number of doctoral dissertations on co-operative topics are declining.

2. Best Practice

The most convincing arguments for forming or joining a co-operative society are successful co-operatives. Therefore, presentation of success stories of new co-operative societies should not only be left to the co-operative press, but should play a greater role in the general media. Measures already taken in this regard are the publication of a CD-ROM for persons interested in co-operative societies, www.neuegenossenschaften.de where further information is offered, examples of newly established co-operatives are presented and relevant texts can be downloaded. Furthermore, the guide of DGRV “Forming a new co-operative – from the idea to the co-operative society (“Eine Genossenschaft gründen – von der Idee zur eG”). The centre for formation of new co-operative societies of the Co-operative Auditing Federation / Genossenschaftsverband e.V. Neu Isenburg, offers a full range of information for persons desirous to establish new co-operatives in its internet presentation "GenoPortal". In future, GdW will support the formation of new housing co-operatives by a centre of competence “www.wohnungsgenossenschaft gründen.de” which is currently established.

On international level, ICA Housing and CECODHAS have published a book on best practice in the application of Co-operative Principles in co-operative housing, presenting 21 cases from 12 countries, including 4 cases from Germany. (Münkner, Hans-H. (Ed.): ICA Housing, Co-operatives Europe and CECODHAS: Application of Co-operative Principles in Practice. 21 cases of housing co-operatives from 12 countries, Marburg 2009.

755 new co-operative societies established in Germany during the past eight years show that co-operative societies are not a model of the past but a concept for the future. According to the answers given by DGRV to the questionnaire in the context if the SCE-Project, co-operatives participate successfully in the market, especially in the classical fields of banking, agriculture, trade, and housing. The legal form of co-operative society is increasingly used in many other branches of the economy. What can be mentioned here are traditional branches like handicraft or consumers co-operatives but also new fields of activity like the health and energy sectors. Craftsmen form co-operatives to improve their supply lines, for joint advertising or to offer services together with other crafts. In such case, specialised craftsmen work together in teams to offer full service under one single contract.

Due to economic difficulties of many service providers in the health sector, a growing number of co-operatives and co-operative service networks were formed. Medical doctors work together for joint purchasing of supplies and joint offer of services, benefiting from economies of scale or working together with other service providers to offer integrated care.

Co-operatives are also used more and more often in the field of production and supply of energy. In this case, citizens join forces to buy gas, oil or electricity at a favourable price or to run a solar or biogas energy plant together. In bio-energy villages supply of energy

for the entire village including a remote heating system is provided by a co-operative society jointly run by the villagers.

Large retail traders withdraw from rural areas. The inhabitants increasingly react to this by forming co-operative village stores, in order to safeguard supply of food staffs in the rural areas and to create social meeting points in the villages.

What is most important is to present newly established co-operatives encouraging founders to imitate them: co-operatives of medical doctors, photovoltaic and bio-energy co-operatives, craftsmen's co-operatives across the lines of individual crafts. Examples of best practice are contained in a forthcoming publication edited by Münkner and Ringle on new co-operatives, in which among others case studies of city marketing (Sundern) and medical doctors co-operatives (Ärztegenossenschaft Jülicher Land eG) are presented. This book will be published in 2010 as volume n°. 108 of the series of the Institute for Cop-operative Studies at the University of Marburg.

Between 2000 and 2008 a total of 754 eGs and one SCE were established. 86 percent of these newly formed group enterprises are craftsmen's, traders' and service providers' co-operatives. Out of this number 78 co-operatives are working in the health sector including 66 co-operatives of medical doctors, 66 co-operatives operate in the sector of renewable energies, 51 are social co-operatives mainly for the integration of the unemployed into working life, 27 are craftsmen's co-operatives, 24 IT and Internet-co-operatives, 20 co-operatives organise communal services with citizens' participation, 19 are co-operative village stores, 17 are transport and communication services co-operatives und 225 are other co-operatives in different fields of activity (Stappel 2010).

According to GdW, there are 54 newly established housing co-operatives. In the future, formation of an increasing number of housing co-operatives is expected. Main potential for future growth is the development of new forms of living together (multi-generation housing; integrative joint living projects) to meet new needs resulting from demographic development but also from the declining role of traditional family support.

3. Barriers or obstacles for cooperative societies in German law

There are not any barriers or obstacles for co-operative societies in German law. § 54 GenG, makes it mandatory for every registered co-operative society including SCE to be affiliated to a co-operative auditing federation (and pay membership fees) and that a pre-registration audit has to be carried out by a co-operative auditing federation (§ 11 paragraph 2 n° 3 GenG). The auditing federation shall deliver its opinion to the registering court, which in turn will have to consider this opinion for its decision whether or not to register the new co-operative society. This is seen by some as an obstacle in the way of choosing eG as a legal form for new enterpises. Under the amended text of § 11a paragraph 2 GenG of 2006 *"the court has to refuse registration, if it is obvious or arises*

from the report of the auditing federation that the interests of the members and of the creditors are endangered".

However, from the point of view of the German co-operative organisations and according to a ruling of the German Constitutional Court (BVerfG decision dated 19. January 2001; Az. 1 BvR 1759/91) and of experts on co-operative law these rules of compulsory membership in a co-operative auditing federation are not a violation of the right to freedom of association but rather a justifiable and reasonable condition for access to the legal form of registered co-operative society. The obligation of every registered co-operative society to be affiliated to a co-operative auditing federation has the advantage of offering qualified audit cum advice by specially trained co-operative auditors (§ 55 paragraph 1 GenG), who do not only carry out financial audit but also 'performance audit' (materielle Prüfung), i.e. assessment of the quality of management in pursuing the object of member-promotion (§ 53 paragraph 1 GenG). Affiliation to a co-operative auditing federation also gives access to advice in legal and tax matters by specialised lawyers and tax consultants.

In this context the national co-operative apex organisations DGRV and GdW emphasise that due to the special regulations of German co-operative law regarding audit by co-operative auditing federations in the formation process as well as during the day-to-day operations of registered co-operative societies as a continuous process of management audit cum advice, the number of insolvent co-operatives in Germany is very small.

Absence of a special tax regime for co-operative societies is not perceived as an obstacle. Co-operative societies are treated like all other enterprises with the only exception that on certain conditions patronage refund, i.e. surplus distribution among members in proportion to business done with the co-operative enterprise, can be deducted as operating cost from the taxable income of the co-operative society.

When the German Co-operative Societies Act was amended in 2006, some new financial instruments were introduced like the possibility to provide in the by-laws for admission of non-user investing members (§ 8 paragraph 2 GenG) and to introduce a fixed minimum capital (§ 8a GenG). In this way, typical features of co-operatives in the field of financing, which were seen by some as 'structural weaknesses' of the legal form of co-operative society as compared to companies were removed and new venues of strengthening the capital base of co-operative societies were opened. This was achieved at the cost of weakening the typical co-operative profile as an organisation with a variable share capital in which owners and users are identical.

4. Role of the European Commission

To spread knowledge about co-operative societies, SCEs and their legal framework and to support the formation of SCEs, the European Commission as the "mother" of the SCE is

called upon to play a more active role. The future development of SCEs as a new legal pattern for cross-border co-operation will to a large degree depend on the activities of the European Commission (DGRV).

List of Abbreviations

AGI	Arbeitsgemeinschaft genossenschaftswissenschaftlicher Institute, working group of co-operative research institutes
	Apex Organisation of German Housing Co-operatives
Art.	Article
Bd.	Band, Volume
BuW	Betrieb und Wirtschaft, enterprise and economy
BVR	Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e.V., National apex organisation of German co-operative banks
CECODHAS	European Liaison Committee for Social Housing, Brussels
DGRV	Deutscher Genossenschafts- und Raiffeisenverband e.V., German Co-operative and Raiffeisen Federation
DRV	Deutscher Raiffeisenverband e.V., German Raiffeisen Federation
DZ BANK	Deutsche Zentral-Genossenschaftsbank, German Central Co-operative Bank
EFTA	European Free Trade Agreement
eG	eingetragene Genossenschaft, registered co-operative society
EHUG	Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister, law on the electronic register of businesses, co-operatives and enterprises
EU	European Union
EuroBilG	Euro-Bilanzgesetz, law on balance sheets in Euro
EWIV	Europäische wirtschaftliche Interessenvereinigung, European Economic Interest Grouping
GdW	Bundesverband deutscher Wohnungs- und Immobilienunternehmen e.V., National Federation of German Housing Co-operatives and Real Estate Enterprises
GenG	Genossenschaftsgesetz, Co-operative Societies Act
GenRegV	Genossenschaftsregisterverordnung, Regulation on the register of co-operative societies
HGB	Handelsgesetzbuch, commercial code
Hrsg.	Herausgeber, editor
ICA	International Co-operative Alliance

KonTraG	Gesetz zur Kontrolle und Transparenz im Unternehmensbereich, law on control and transparency of enterprises
RZ	Randziffer, number of annotation
SCE	Societas Cooperativa Europea, European co-operative society
SCEAG	SCE-Anwendungsgesetz, law on the application of the SCE Regulation in Germany
SCEBG	SCE-Beteiligungsgesetz, law on the application of the EU Directive on employees' involvement in SCEs having their registered office in Germany
SCE-D	SCE having its registered office in Germany
SCE-Reg	SCE-Regulation
SE	Societas Europea, Europäische Aktiengesellschaft, European company
UmwG	Umwandlungsgesetz, conversion law
VAG	Gesetz zur Beaufsichtigung von Versicherungsunternehmen, law of supervision of enterprises in the insurance business
VVaG	Versicherungsverein auf Gegenseitigkeit, mutual insurance association
ZdK	Zentralverband deutscher Konsumgenossenschaften, National federation of German consumer co-operatives
ZfgG	Zeitschrift für das gesamte Genossenschaftswesen, Quarterly of Co-operative Studies

GREECE

By Michael Fefes

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Greek legislation. – **1.1.** Essential bibliography. – **2.** Comments. – **3.** Overview of national cooperative law. – **3.1.** General remarks. – **3.2.** Legislation on rural cooperatives. – **3.3.** Legislation on civil cooperatives. – **3.4.** Legislation on cooperative banks. – **3.5.** Legislation on social cooperatives. – **3.6.** Legislation on housing cooperatives. – **3.7.** Essential bibliography. – **4.** .Comments on national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Greek legislation

Up to date there is no national legislation implementing the SCE Regulation. According to information from the Ministry of Economics, a draft law is ready and they think that by the end of June 2010 the relevant law will have been published in the Government's Gazette. In practice, however, no SCE may be formed in Greece, since the relevant authorities have not yet taken action towards that direction. Naturally, the SCE Regulation is directly applicable and effective, but, in fact, the founders have to overcome the bureaucratic labyrinth, the reluctance and the mentality of public servants and persuade them, for instance, for the registration requirements to be met. From my personal experience I may say that this obstacle looks rather insurmountable. Last year I was informed of an attempt to form an SCE in Greece, which failed for that reason specifically.

The only legislation passed is indirectly affecting the SCE. More specifically, Presidential Decree 44/2008 concerns the completion of the statutes of SCE with regard to the involvement of employees according to Directive 2003/72. One may comment that it is preposterous to adopt measures on the role of employees in an entity (SCE) which cannot be formed, because there is no relevant legislation, however this is the current situation in Greece.

I have to point out that the said Presidential Decree was only adopted after the European Commission instituted proceedings against Greece for non-implementation of Directive 2003/72 (Case C-82/08, Commission v. Hellenic Republic), since the deadline for implementation was on 8/8/2006. The Commission asked the ECJ to declare that, by not adopting the laws, regulations and administrative provisions necessary to comply with Directive 2003/72, and in any event by not informing the Commission of such measures, the Hellenic Republic has failed to fulfil its obligations under that directive. However, after the adoption of Presidential Decree 44/2008, the President of the Court has ordered that the case be removed from the register.

Finally, for the sake of clarity, I have to mention some references to SCE in Greek legislation, which are irrelevant to the implementation of the Regulation. Law 2578/1998 harmonized Greek legislation with Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. Law 2578/1998 was amended by Law 3517/2006 to provide for the tax treatment of capital gains, reserves, income etc. in case of transfer of the registered office of an SCE. This is the first time SCE is referred to in a Greek law. Nevertheless, such reference is not to the direction of implementation of the Regulation, it is only a reference for tax purposes that should be included in the relevant law for the sake of clarity. Law 2578/1998 included Annex A, which described the legal entities of the Member States affected by the law. Annex A was amended by Law 3517/2006 to include SCE, while Law 3453/2006 added an Annex A1. Annex A1 includes SCE in its point 26 and was further amended by Law 3763/2009 due to the accession of Bulgaria and Romania.

As already mentioned, no SCEs are formed in Greece. To reach this conclusion, besides the information collected as to the lack of national legislation implementing the SCE Regulation, I have visited all competent public authorities and services (for instance, Ministry of Rural Development and Food, Ministry of Economics and Ministry of Health and Social Solidarity) and I was informed that there was no Registry for SCEs, therefore it would be impossible to form one. I have also visited the Central Union of Greek Chambers, where, according to Law 3419/2005, a General Commercial Registry is formed and SCEs should be registered therein. However, the General Commercial Registry is not ready yet, but still in an experimental phase (it is expected to be ready within 2010).

Only very recently (February 2010) I discovered that an entity was formed in Greece as a cooperative bearing in its name the acronym SCE. The entity is a credit cooperative established according to Law 1667/1986 on civil cooperatives (see below). However, the cooperative may not be yet categorized as an SCE within the scope of the Regulation, though its statutes refer to the Regulation and follow its provisions in several points. I may classify it as a "quasi-SCE", because there are two shortcomings.

First, according to art.5§4 of the SCE Regulation, "The statutes of the SCE shall include at least: - the nominal value of the subscribed shares, the amount of the subscribed capital, and an indication that the capital is variable". The statutes of the said cooperative do not conform to this requirement and the Regulation is adamant on this point. Naturally, I have already informed them on this point and they said they would amend the statutes to this direction; however, the current situation is such.

Secondly, as provided for by local legislation, the cooperative was registered with the Cooperatives' Registry kept with the District Court. Article 11 of the SCE Regulation on registration and disclosure requirements provides that "every SCE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with the law applicable to public limited-liability

companies". The District Court Registry is not the same as the Sociétés Anonyme Registry; therefore the cooperative does not abide with the registration requirements. I was informed that the founders of the cooperative have applied to register there as well, but I am not sure whether their application will be accepted due to the lack of relevant legislation. They have not sent a notice to the Official Journal.

As a conclusion, the credit cooperative does not conform to two provisions of the SCE Regulation; therefore, we may not, at least for the moment, consider that there is an SCE in Greece.

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2. Comments

It is not an easy task to explain why the institution of SCE is non-existent in Greece, because there is no legislation implementing the Regulation. Thus, one may assume what would have happened if the suitable legislation were at hand. My opinion is that it is improbable for SCEs to have been formed in Greece for the following reasons.

In Greece, the great majority of cooperatives do business in the rural sector. One may say that, until very recently, by saying "cooperative" Greeks meant only the rural ones. Unfortunately, most rural cooperatives failed for many reasons, which cannot be analyzed in detail here. It is enough to state briefly that the main reasons were the weakening and falsification of the legal and institutional framework of cooperatives, the interference of the State with cooperative affairs, the annulment of a real credit policy by cooperatives after the creation of the Agricultural Bank of Greece and the total indifference of the State to the

establishment of sound agricultural cooperative education and training for farmers. All this resulted in the hesitation and gradual reluctance and indifference to the cooperative cause.

Greek cooperatives, supposed to be private enterprises, were never left to operate freely as an enterprise. Due to the clientelistic character of Greek political life, the various governments had tried to manipulate the electoral vote of rural populations and saw cooperatives as the best means. Regardless of their success or failure, the administration of cooperatives took more interest in political activities than in the viable functioning of cooperatives. For instance, the election of administrative and supervisory organs, depending on the political position of the governing party (Conservatives or Socialists), were done either according to a single ballot system or to a party slate system. Moreover, the mismanagement and the farmers' indifference transformed cooperatives into a marginal factor of agricultural economic life and made them simple middlemen between the individual farmers and the Agricultural Bank or the State.

Especially during the 80s, the role and function of cooperatives was totally falsified. After the Greek accession in the EEC, cooperatives were used as governmental tools to implement "social" policies in the agricultural sector. The strict political tutelage and severe party involvement in cooperatives resulted in serious damages to the institution and the general distrust of Greek public opinion. Thus, cooperatives have been transformed into quasi-public entities serving the interest of the State, and not the real interests of their members.

For the above reasons, cooperative enterprise is not very popular because it has been connected to the failure of rural cooperatives. It is in other words, in the people's mind, a "depreciated" product not suitable for serious business. The problem is that the policy-makers share this opinion and see in cooperatives only a necessary evil for social reasons and not an entrepreneurial vehicle. The lack of cooperative education augments the problem because people who are not familiar with cooperative principles and practice are very often called to regulate entities whose function they do not know in depth. It is a well-established myth in Greece that cooperatives are social policy instruments; therefore, entities such as SCEs are faced suspiciously as falsifying the true nature of cooperatives. The prevailing idea is that a company may well serve the needs of investors for profit, while a cooperative is a social institution not connected to profit. The fact that a not-for-profit enterprise may provide services or cover the needs of its members is a distant theory.

Nevertheless, there are today many cooperatives, rural and civil, which are examples of entrepreneurial success. Moreover, the cooperative banking sector grows fast and for the first time in Greece is seen as a potentially serious competitor to commercial banks. Even these Greek cooperatives are small and act at local or prefectural level, so they think that their size is not enough to be able to initiate the procedure of forming an SCE with partners from other Member States. Cooperative banks themselves think their main priority is to increase the volume of their business at the local level and create a reliable network

covering the whole country (they currently share approximately 1% of the Greek banking services market).

In conclusion, the lack of the relevant legislation is definitely a major shortcoming leading to the failure of SCE in Greece. It goes without saying that national authorities have not appreciated and promoted the new institution. On the other hand, Greek cooperatives do not look ready to take advantage of SCE. In any case I was informed by public servants working for the Ministry of Economics that a draft law on SCE is already at hand and they are confident it will be published in the Government's Gazette by the end of June 2010.

My opinion is that after the adoption of the necessary legislation and initiatives for information, sensitization, correspondence, and education on SCEs, Greek cooperatives may become reliable partners for cooperatives from other Member States, given the geographical vicinity of Greece with Asia and Africa. The case of the quasi-SCE referred to above presents a telling example of some people, who against all national odds are trying to form an SCE definitely because they think that the specific legal and entrepreneurial vehicle serves their cause. I also think that such initiatives, though isolated, are specimen for the potential and dynamism of SCEs, and should be encouraged by the State.

3. Overview of national cooperative law

3.1. General remarks

Cooperative legislation in Greece is rather fragmented. There is no general law for all types of cooperatives. Each type of cooperative is regulated separately with different pieces of legislation that are not affected by each other. This leads to different treatment among several types of cooperatives because some legal norms are rather old and outdated, while others are brief and incomplete, leaving gaps and causing problems. Moreover there is no official codification of cooperative legislation. Finally, the general rules of civil and commercial legislation are applied to cooperatives in cases not covered by the special cooperative legislation. Greek cooperative legislation describes the least prerequisites that cooperatives must follow (compulsory law – ius cogens). The legislation itself provides clearly whether the statutes may choose other solutions than those indicated in it. On other issues not covered by legislation, the statutes may provide themselves according to the needs of the partners under the condition they do not violate other legally compulsory provisions.

There is no selection done as to the cooperative laws during the present research, therefore almost the whole body of Greek cooperative legislation was compiled. This means that the present report entails a kind of up-to-date "codification" of Greek

cooperative legislation for each separate kind of cooperative. Since there is no English version at all, I have translated the basic points of each law according to the Program's requirements.

Cooperatives are referred to in Article 12 of the Greek Constitution (Right of Association). Paragraphs 4 and 5 of the Article provide specifically for them. The former reads: "Agricultural and civil cooperatives of any kind are self-governed according to the provisions of the law and their statutes and are protected and supervised by the State, which must care for their development".

The latter provides for the establishment of compulsory cooperatives. Naturally the notions "cooperative" and "compulsory" are contradictory and incompatible; nevertheless they may be a Greek originality. Compulsory cooperatives are established to serve causes of common benefit, or public interest, or common exploitation of agricultural parcels or other wealth sources, provided that there is equal treatment among the members.

In the present report the basic points of law on rural and civil cooperatives is described. As regards the cooperative banks, and the pharmacists' cooperatives, they are regulated by the law on civil cooperatives, which is used as a framework for all non-rural cooperatives. Therefore, a description of cooperative banks' legislation is made where necessary. The housing cooperatives legislation is also described; however, such legislation imposes many restrictions, which violate basic cooperative principles and even the Greek Constitution itself with the excuse of public interest (see below under D). The legal regime of "social" cooperatives is rather narrow, because it concerns only the provision of services to mentally ill persons. Therefore, there is no ambit for formation of social cooperatives and this causes frustration to all those who would like to offer a wider range of services. Social cooperatives may be formed according to the civil cooperatives legislation. In any case, a thorough presentation of the legal regime of those cooperatives is done, because some of them have a worth-to-mention activity helping people in need.

Before going on to the next part, I have to mention that all national law on cooperatives was collected after extensive research in legal databases.

3.2. Legislation on rural cooperatives

a. Definition

The basic legislative piece for rural co-operatives is Law 2810/2000 as amended from time to time. Article 1§1 reads that the Rural Cooperative Organization (hence ASO) is an autonomous association of persons, which is set up voluntarily and aims, through the mutual assistance of its members, their economic, social and cultural development and advance through a co-owned and democratically-run business.

b. Activities

Article 1§1 provides that by ASO is meant the fish, livestock, poultry, beekeeping, sericulture, forestry, agritourism, agroindustrial, cottage and other cooperatives of any sector or activity of the rural economy. ASOs of all levels are private legal entities and have commercial status. They develop all kinds of activities to achieve the objectives within the scope of the law and their statutes. The law does not provide directly for business with non-members, nevertheless it is concluded by the wording of article 19§1. More specifically, it reads that the net income of an ASO includes surpluses and profits. The sum remaining after the deduction of surplus is considered to come from business with non-members and is the profits.

c. Forms and mode of setting up (Article 1§2, Article 3, Article 4)

ASOs are distinguished by first-, second-, and third-level. Rural Cooperatives are first-level, Rural Cooperatives' Unions are second-level and Central Rural Cooperatives are third-level. ASOs may also form Partnerships and Cooperative Companies. All the above have commercial status. The basic reason for such a structure is the exploitation of economies of scale by an ASO (e.g., first-level cooperative produces, second-level packages and sells and third-level promotes, designs, manages and exports at a national level).

A special reference is for PASEGES (Pan-Hellenic Confederation of Unions of Agricultural Cooperatives - Panellinia Synomospondia Enoseon Georgikon Synetairismon). PASEGES is likely to be a unique case in the cooperative movement. Though not being itself a cooperative and not having commercial status and business activities, according to Greek legislation, it is a very important factor of the Greek cooperative movement. Its seat is in Athens and its official role is to serve as the ideological organ of cooperatives (whatever this may mean). More specifically, Article 33 provides that PASEGES is the ideological and coordinating organ of ASO, represents agricultural cooperatives of all levels internally and externally and attends for the observance of cooperative principles and the development of cooperative ideals. Members of PASEGES are Unions of rural cooperatives (2nd level); however, its statutes may provide that Central Cooperative Unions (3rd level), Partnerships of rural cooperatives and Cooperative Companies may also become members.

Setting up a rural cooperative requires statutes and their signing by at least seven persons, and its approval by the District Court of the registered office of the cooperative. The statutes are a private contract among the founding members and include basic details such as, for instance, the commercial name, the registered office, the purpose and activities, the membership conditions etc.

The temporary Administrative Organ files an application with the District Court in regard to the approval of the statutes. The District Court pronounces its judgment on that application. If the statutes are not lawful, the Court defers its decision and issues an

interim ruling inviting the temporary Administrative Organ to make the necessary amendments or to fill in the lacunas within fifteen business days from the publication of the interim decision. Following that, the Court issues its final decision. The Administrative Organ may appeal a negative ruling of the Court.

d. Membership

Article 5§1 lays down the conditions of membership, that is members of agricultural cooperatives may be natural persons who have full capacity to contractual action, work in any sector or activity of the rural economy served by the activities of the cooperative, meet the terms of the statutes and agree to use its services. If provided in the statutes (§§2), members of the cooperative may also become legal persons whose statutory objective is the pursuit of rural business, which is served by the activities of the cooperative. Particular terms and conditions of such participation and representation is provided for by the statutes.

On the other hand, the statutes may provide for the acquisition of further additional optional shares by the members, the employees of the cooperative and third persons, so investor members are allowed (Article 8§3). There are no more references in the law as to investor members, so one may conclude that they do not have any further rights, for instance special meetings of non-members holders of optional shares or attendance of General Meeting.

To become a member (Article 6), one has to apply in writing and the Administrative Organ decides on the admittance or not of the applicant within a time limit set out by the statutes. The Administrative Organ justifies its decision and the applicant, in case of a negative answer or no answer at all, may appeal against such a decision in front of the first ordinary General Meeting, which shall make the final decision. The statutes also provide for the constraints and impediments to becoming a member as well as the terms and conditions of withdrawal or expulsion of a member, and the minimum membership period.

e. Financial profiles

Article 8 provides that each member participate in the cooperative with at least one share, whose amount is defined by the statutes (Article 4§1e) and may distribute interest. The amount of the shares may vary after a decision by the General Meeting. The law does not provide directly that the capital of a cooperative is variable; however, it is concluded by the wording of Article 8.

Article 19§1 provides that the net income of a cooperative is comprised of surplus and profit. Surplus comes from business with members and profit from business with non-members. According to Article 19§3, surpluses may be used either a) as investment in the cooperative or b) as dividends to the members in accordance to the volume of business done with the cooperative or c) to promote other activities approved by the members. 10% of the surplus, unless the statutes provide for a higher percentage, is withheld for the

formation of a legal reserve until the total amount shall reach the amount of the capital. The reserve is also formed by the profits, any donations to the cooperative, and any other income not regulated differently by the statutes.

As said above, surplus may be distributed to members as dividends. The law does not provide for distribution of profit to members who hold compulsory shares, since all profits go to the legal reserve. Distribution of profit, a part of it or the whole, is only possible to the holders of optional shares, if so provided by the statutes. Part of the surplus may also be distributed to holders of optional shares.

Moreover, the statutes may provide that the shares (both compulsory and optional) shall bear interest, which is allocated with priority to their holders from the cooperative's income after the expenses, losses and depreciations are deducted. The statutes may also provide for patronage refunds and any other way for allocation of surplus or profit.

In case of dissolution and liquidation (Article 25), if there are net assets, the optional shares are paid first and the remaining amount, if any, is allocated according to the provisions of the statutes. No special reference is made to the legal reserve, so one may conclude that it is allocated as well, unless the statutes provide otherwise.

According to Article 18, cooperatives are obliged to issue a Balance Sheet and an Income Statement at the end of each financial year which are presented by the Administrative Organ to the General Meeting with the necessary explanatory and accountability reports. Article 17 provides that all accounts and reports are compulsorily audited by accountants, chartered or not, depending on the size of the cooperative. The law does not provide that the audit by the accountants has to be cooperative specific.

There is no provision for any publication or deposit of those documents; however, it is concluded by the wording of Article 17§3 that a copy of the findings of the auditors on the Balance Sheet and Income Statement is filed with the competent supervisory authority. Nevertheless, Article 18 provides for the application of Law 2190/1920 as regards cooperatives similar to sociétés anonyme, so the said documents are published in a daily newspaper of the prefecture of the registered office of the cooperative.

f. Organisational profiles

Article 8 provides that each member has one vote ("one member one vote" principle). If the statutes provide for the acquisition by a member of additional shares in respect with the volume of business done with the cooperative, the maximum number of votes cannot exceed three.

There is a legal quorum (Article 11), if more than half of the members are present or represented (there is no limitation as to the members represented). If there is no quorum, there is another General Meeting after a week's time where any number of members is enough for a legal quorum. The majority in both cases is 50% plus one vote. In certain cases, special quorum and majority rules apply (2/3 or 1/2 of the members and 2/3 of the votes).

The law (Article 14) provides for the one-tier system, therefore there is only an Administrative Organ of at least three members elected for a period between 2 and 4 years. The members may be re-elected. If the employees of a cooperative are more than twenty, one representative participates in the Administrative Organ with rights of voting for personnel issues. If the statutes provide so, the Administrative Organ, after an open call published in the daily press, may hire a General Director (Manager), whose tasks are described by the Administrative Organ.

Finally, according to Article 17, the administrative, audit and financial control is the task of external auditors (chartered accountants in case of a cooperative similar to a société anonyme) appointed by the General Meeting. The auditors may be re-appointed for a maximum 5-year term and enjoy wide appreciation and powers.

g. Registration

The statutes are recorded in the Registry of Agricultural Cooperatives, held with the District Court, stating the number of its decision. Following that, the cooperative acquires legal personality and commercial status. The same procedure is followed in case the statutes are amended. The Secretariat of the Court sends to the supervisory authority certified copies of the approval decision and the statutes within one month from the registration of the decision.

h. Control (Article 16)

The Minister of Rural Development and Food enacts public supervision and control on cooperatives. The Minister may delegate specific control and supervision tasks to either civil servants working at the Ministry or to auditors or other special scientists or experts. The content of the supervision and control concerns the legal function of the cooperative and its assistance to achieve its goals. More specifically, the Minister controls whether a) the equity capital or other outstanding liabilities of the members have been covered, b) the provisions of the legislation, the statutes and the decisions of the General Meeting are abided with, c) the details of the Balance Sheet, the Income Statement and other financial documents are true and accurate and d) the books and statements are true and accurate.

According to Presidential Decree 176/2003, the above tasks were delegated to the Directorate of Rural Co-operation and Group Activities of the Ministry for the administrative and legal issues and the Directorate of Financial Control and Supervision for the financial-audit issues. Specific tasks may be delegated to the above mentioned persons.

The exercise of control on a specific cooperative is made after a mandate by the Minister in cases a) where there are allegations against the Administrative Organ or the Manager or b) after an application by 1/5 of the members or c) if the Minister himself/herself finds it necessary. The control and supervision organs are independent and none may intervene to obstruct their mission.

i. Transformation and conversion

Article 21 provides for the merger of two or more cooperatives and either the formation of a new cooperative or the acquisition by one of them of the other merging entities. The merger takes place after a decision of the General Assemblies of the cooperatives involved with the special quorum and majority requirements, while there are publication requirements and assessment of the value of the property of the merging cooperatives by independent experts. Further details on this issue will be explained in the final report.

According to paragraph 11, a cooperative may be transformed to a société anonyme or a limited liability company, provided it is a second- or third-level cooperative. The transformation needs the consent of the General Meeting with the special quorum and majority requirements. The procedure of the transformation to a société anonyme is described in Law 2190/1920 and to a limited liability company in Law 3190/1955. The same paragraph also provides for the possibility of a spin-off of a sector or activity of a cooperative (any level) to a Cooperative Société Anonyme or Cooperative Limited Liability Company (Article 32).

j. Tax treatment

Articles 35 and 36 provide for the special tax treatment of rural cooperatives, while Article 21§§9, 10, 10A provides for special financial and tax treatment in case of the merger of two or more cooperatives and the formation of a new cooperative.

The statutes and their amendments, the contributions of members, the members' deposits with the cooperative, the loans to them and the contracts between cooperatives and the State or Public Law Legal Persons are not burdened with stamp duty or other duties in favour of the State or a third person or other duties whatsoever. Cooperatives enjoy all preferential and favourable treatment provided for any third person in case of merger of cooperatives. Furthermore, the purchase of land or other real estate for business purposes or chattel for rural production purposes has the same tax treatment as the State would. Cooperatives do not pay VAT in many cases. According to L. 1676/86 there is no tax for capital accumulation. The reserves formed by surpluses are tax free. Profits are taxed only in the hands of the cooperative. Finally, every 4 years there is a valuation of permanent assets and in the event of an overvalue, tax is paid.

3.3. Legislation on civil cooperatives

a. Definition

Law 1667/1986 is the legislation applying to civil cooperatives. Article 1§1 reads that the Civil Cooperative (hence CC) is a voluntary association of persons with economic purpose, which does not have activities in the sector of rural economy, and aims especially

through the co-operation of its members to the economic, social and cultural development of its members and the amelioration of their life standards through a common enterprise.

b. Activities

Article 1§2 provides that CCs are mainly production, consumer, supply, credit, transport and tourism cooperatives. It describes their activities, mainly i) common production, ii) supply of goods to cover professional, biotic or other needs of their members, iii) technical or managerial assistance to members to increase or improve their business, iv) procession or selling goods of their members, v) loans, guarantees, insurance or other economic facilities to their members, vi) professional, cooperative and cultural education, vii) satisfaction of social and cultural needs. In other words the CCs have a wide range of activities with the exception of rural economy.

The CCs of all levels are private legal entities and acquire commercial status after their publication (§§7). The law does not provide for a prohibition for business with non-members. However, the law does not make any distinction between surpluses and profits, but it refers only to profits.

c. Forms and mode of setting up

CCs are also distinguished by first-, second-, and third-level. Civil Cooperatives are first-level, Civil Cooperatives' Unions and Federations are second-level and the Confederations of Civil Cooperatives are third-level (Article 12).

Setting up a CC requires statutes and their signing by at least fifteen persons (in the case of a Consumer CC, 100 persons), and its approval by the District Court of the registered office of the cooperative. The statutes are a private contract among the founding members and include basic details such as, for instance, the commercial name, the registered office, the purpose and activities, the membership conditions etc.

The District Court may accept or deny the registration of the statutes within ten days of its filing with the Secretariat of the Court. If the statutes lack the essential details or is not lawful, the Court invites the temporary Management Organ to make the necessary amendments. The Management Organ may appeal against a negative ruling of the Court before the First-Instance Court of the registered office of the cooperative.

d. Membership

Article 2 lays down the conditions of membership; that is, members of CCs may become only adult natural persons who have full capacity to contractual action, and meet the terms of the statutes. No legal person may become a member of the cooperative, unless provided otherwise in the statutes (§§2). A person cannot become member to more than one cooperative having the same registered office and the same purpose. No other members other than user-members are allowed in CCs as concluded by the wording of Article 3.

To become a member (Article 2§4), one has to apply in writing and the Administrative Organ decides on the admittance or not of the applicant at its first meeting after the filing of the application. Regardless of the positive or negative answer by the Administrative Organ, the entry of new members is approved by the following General Meeting; however, the capacity of members is attributed by the time of consent by the Administrative Organ. In case of a negative decision by the General Meeting, the applicant may appeal before the District Court, and then before the First-Instance Court of the registered office of the cooperative, whose decision is the final one.

The statutes provide for the constraints and impediments to becoming a member as well as the terms and conditions of withdrawal or expulsion of a member, and the minimum membership period. In case of expulsion, the member has the above-described legal remedies. The statutes may also provide for a minimum period of three-years membership.

e. Financial profiles

Article 3§1 provides that each member participates in the cooperative with at least one share. The law provides that the capital of a cooperative is variable (Article 2§9). The statutes (Article 3§3) may provide for the acquisition of five additional optional shares by the members with the exception of Consumer CCs (100 shares) and Credit CCs (1501 shares-see below). Article 11 provides also that the General Meeting may impose on members the subscription of extraordinary shares in case of financial hardship.

Article 9§4 provides that the net profits of a cooperative are used for the establishment of legal, statutory or special reserves and for distribution to the members. At least 10% of the profits are withheld for the formation of a legal reserve until the total amount shall reach the amount of the accumulated shares. The General Meeting may decide for the establishment of statutory or special reserves. The remaining profit is distributed to the members and what is not distributed may be used for the purposes of the cooperative after a decision of the General Meeting.

In case of bankruptcy or dissolution and liquidation (Article 10§2), if there are net assets, they are allocated to the members in accordance to the number of the shares they hold, unless the statutes provide otherwise. No special reference is made to the legal reserve, so one may conclude that it is allocated as well, unless the statutes provide otherwise.

According to Article 9§3, the financial year for a CC always ends on the 31st of December. At the end of each financial year, the Management Organ issues the Balance Sheet and the Income Statement, which are presented to the Supervisory Organ 30 days before the holding of the General Meeting. The Supervisory Organ draws its findings and all relevant documents are presented to the General Meeting to be approved. The financial documents are published within one month in a daily newspaper of the prefecture of the

registered office of the cooperative. The law does not provide for an audit by accountants, so it remains at the discretion of the organs or the statutes of a CC.

f. Organisational profiles

Article 4§2 provides that each member has one vote ("one member one vote" principle). There is a legal quorum (Article 11), if more than half of the members are present. Representation is prohibited, unless there are more than 1.000 members in a CC. In that case, the statutes may provide for a General Meeting formed by elected representatives of the members.

If there is no quorum, there is another General Meeting after a week's time where at least 1/5 of the members must be present and if there is no quorum again, then after seven days any number of members is enough for a legal quorum. The majority requirements in all cases are 50% plus one vote. In certain cases, special quorum and majority rules apply (2/3 or 1/2 of the members and 2/3 of the votes).

The law (Articles 7 and 8) provides for the two-tier system, therefore there is a Management Organ of at least five members elected for a period between 2 and 4 years. If the employees (non-members of a cooperative) are more than twenty, one representative participates in the Management Organ. The members of the Administrative Organ do not receive a salary, only expenses. There is also a Supervisory Organ of at least three members. Both bodies are elected by the General Meeting. A person cannot participate in both organs.

The Management Organ may hire a manager or other employees, while the Supervisory Organ may hire up to three experts or consultants for the purposes of account and management control. The administrative, audit and financial control is a task for the Supervisory Organ, which has the right to hold a General Meeting (extraordinary) if they discover any violations of law or statutes or resolutions of the General Meeting.

g. Registration (Article 1§§3, 6, 7)

The statutes are recorded in the Registry of Cooperatives, held with the District Court, within ten days after its filing. Following that, the cooperative acquires legal personality and commercial status. The same procedure is followed if the statutes are amended. The Secretariat of the Court sends to the supervisory authority certified copies of the approval decision and the statutes within 30 days from the registration of the decision.

h. Control (Article 13)

The Minister of National Economy (today Economy, Competitiveness and Shipping) has to provide for the development of cooperatives (legislation, consultation, research, education, assistance to supervisory boards). For this purpose, Article 13 provides for the establishment of a Cooperatives' Council, which will consult with the Minister on cooperative issues. There is also a Department of Cooperatives in the Ministry.

Furthermore, the Minister is competent to enact public supervision and control on cooperatives.

The Cooperatives' Council is composed by its chairman (nominated by the Minister), the Director of the Department of Cooperatives, a cooperative expert (nominated by the Minister), a representative of the General Confederation of Greek Workers, a representative of the Central Union of Municipalities, a representative of the General Confederation of Greek Professionals and Craftsmen and six representatives of the cooperatives.

The Cooperatives' Council has never been formed and as of today does not exist.

i. Transformation and conversion

Article 10§4 provides for the merger of two or more cooperatives. The merger takes place after a decision of the General Meetings of the cooperatives involved with the special quorum and majority requirements and registration of the new statutes with the District Court.

The law does not provide for transformation of CCs to other types of entities.

j. Tax treatment

There is no special tax treatment for civil cooperatives.

3.4. Legislation on cooperative banks

Introductory remark

As mentioned above under 2, Law 1667/1986 is the legislation applying to civil cooperatives, a category of which are credit cooperatives. Thus, the said legislation is valid for credit cooperatives. However, most credit cooperatives were transformed to credit institutions - banks - in the 90s, therefore in the present part of the report, there will be a brief comment of the legislation on cooperative banks departing from L. 1667/86. Such legislation is Law 3601/2007, which harmonises Greek legislation with Directives 2006/48 of the European Parliament and of the Council of 14th June 2006 relating to the taking up and pursuit of the business of credit institutions (L 177/30.6.2006) and 2006/49 of the European Parliament and of the Council of 14th June 2006 on the capital adequacy of investment firms and credit institutions (L 177/30.6.2006). The law is in substance an exact transfer of the wording of the directives, so no translation in Greek is needed. Furthermore, cooperative banks are regulated by several decisions of the Governor of the Bank of Greece (Greek central bank), most important of which is 2258/2.11.93 as amended. The following comments concern only cooperative banks, since the activities of the remaining credit cooperatives in Greece are residual and secondary.

a. Definition

As in CCs. Article 5§1, L. 3601/2007 provides that credit institutions may be established and function only as Sociétés anonyme or as “pure” credit cooperatives of L. 1667/1986 (meaning that the cooperatives have only credit business and are not multi-purpose cooperatives).

b. Activities

As in CCs.

A Cooperative Bank may do business with non-members after permission by the Bank of Greece. The volume of business with non-members may not exceed 50% of the loans granted or the deposits held. Nevertheless, the Bank of Greece may approve exception to this limitation if a member of the Bank participates in such business or the transactions are related to secondary intermediary banking services.

Cooperative Banks may receive deposits in current accounts and participate in interbank and exchange markets, but they cannot provide underwriting services.

c. Forms and mode of setting up

As in CCs.

For any amendment of the statutes of a Cooperative Bank, the previous consent by the Bank of Greece is necessary. Such consent is a prerequisite for the registration of such amendment in the Cooperatives’ Registry kept at the District Court.

d. Membership

As in CCs.

The domicile or seat of the members is in the geographical area of the Cooperative Bank in regard to its capital (see below under e).

Not-for-profit legal persons, whose seat is outside that area, but their members live in that area, may become members. If the Cooperative Bank has accumulated the subscribed capital, any legal person may become a member.

Leasing or Factoring Companies may also become members after a special license by the Bank of Greece. It is prohibited to give loans to those members, however they are not investor members, since they may use other services.

Each new partner in cooperative banks must pay, besides the value of the share, a contribution respective to the net assets of the bank, as calculated in the last Balance Sheet, plus any surplus value accredited by chartered accountants. If a partner withdraws, the value of a share is calculated accordingly.

e. Financial profiles

As in CCs.

The statutes of a credit cooperative may provide for the acquirement of 1.501 optional shares. The value of compulsory and optional shares is equal.

The capital of a Cooperative Bank is variable, however the subscribed capital shall not be less than EUR 6.000.000 EUR 10.000.000 or EUR 18.000.000 depending on the area of activity of the Bank (a prefecture, more prefectures, Attica, Salonica or the whole country).

The solvency ratio must be 10%. Cooperative Banks may draw cash from the Bank of Greece offering as collateral Greek State bonds. The total cash drawn from interbank market may not exceed 15% of the own funds. If the Cooperative Bank does business at a panhellenic level, it may be 25% of the own funds.

There is a compulsory audit by chartered accountants and the Balance Sheet and Income Statement are published in daily newspapers.

f. Organisational profiles

As in CCs.

The majority of the members of the Administrative Organ must live in the geographical area of the Cooperative Bank in regard to its capital (see above under e).

In certain cases, special quorum and majority rules apply (50% +1 of the members or 1/3 of the members and in case the members are more than 1.000 at least 400 and 4/5 of the votes).

The provisions of L. 1667/86 providing for the two-tier system, may not apply on Cooperative Banks after an approval by the Bank of Greece.

g. Registration (Article 1§§3, 6, 7)

As in CCs.

h. Control (Article 13)

As in CCs. The Bank of Greece enacts also the supervision provided for by Greek banking legislation.

i. Transformation and conversion

As in CCs.

j. Tax treatment

There is no special tax treatment.

3.5. Legislation on social cooperatives

a. Definition

Article 12§§1-19 of Law 2716/1999 is a special piece of legislation applying to social cooperatives (hence SC). The said legislation is supplemented, where necessary, by the provisions of the legislation on civil cooperatives (L. 1667/86), the provisions of Greek Civil Code and other legal rules regulating psychiatric issues.

There is no definition of a social cooperative; however, its main characteristic is that it is a Mental Health Unit (hence MHU), which is organically affiliated with a Mental Health Sector (hence MHS). Greece is divided in as many MHSs as the prefectures of the country with the exception of prefectures sparsely populated which merge with neighbouring prefectures and the prefectures of Attica and Thessaloniki, which are divided in more MHS. Thus, a social cooperative is necessarily a part of the public sector of mental health directed by the Ministry of Health.

b. Activities

Paragraph 1 provides that SCs aim the socio-economic incorporation and professional integration of persons suffering serious psychosocial problems and contribute to their treatment and therapy and, if possible, their financial independence.

Moreover (§2), SCs may at the same time be production, consumer, commercial, supply, credit, transport, developmental, educational, tourism and housing units and develop any economic activity (rural activities included) whatsoever. SCs may also: a) Establish and keep sales markets wherever, b) participate in common utility enterprises (if such participation is legally allowed) and more specifically in EEIGs, Syndications, Limited Liability Companies, Sociétés Anonyme and Municipal Enterprises and c) participate in developmental programs or cooperate with other entities to promote activities related to mental health and rehabilitation.

The SCs of all levels are limited liability private legal entities and acquire commercial status after their publication (§1 in conjunction with art. 3§1, L. 1667/86). The law does not provide for a prohibition for business with non-members. However, the law does not make any specific distinction between surpluses and profits, but it refers only to profits. On the other hand, a distinction between surplus and profit may be implied (see below under e).

c. Forms and mode of setting up

SCs are also distinguished by first-, second-, and third-level. Social Cooperatives are first-level, Social Cooperatives' Unions are second-level and the Panhellenic Federation of Unions of Social Cooperatives is third-level (§15).

Only one SC may be established within an SMH (§2). Therefore, the Minister of Health examines the statutes and makes an expediency control (that is, whether there is a reason to form the SC) considering the potential of the MHU, the development ability within the

relevant action area and the consulting opinion of the SMH. Setting up an SC requires statutes and their signing by at least fifteen persons (also in the in case of a Consumer SC), and its approval by the District Court of the registered office of the cooperative (§3 in conjunction with art. 3§1, L. 1667/86). The statutes are a private contract among the founding members, however there is no provision to include basic details.

The District Court may accept or deny the registration of the statutes within ten days from its filing with the Secretariat of the Court. If the statutes lack the essential details or is not lawful, the Court invites the temporary Management Organ to make the necessary amendments. The Management Organ may appeal a negative ruling of the Court before the First-Instance Court of the registered office of the cooperative.

The District Court also seals before their use the following books of the SC: Minutes of the General Meeting, Minutes of the Management Organ, Minutes of the Supervisory Organ and Members Registry (§13).

d. Membership

Paragraph 4 lays down the conditions of membership, which differ from the common conditions for other cooperatives. Members of SCs may become:

Category A: Adult natural persons or minors 15 years old, who need rehabilitation because of mental disorder. No contractual capacity is necessary. Such persons must be at least 35% of the members.

Category B: Adult natural persons working with mental health patients, such as ergotherapists, trainers, psychiatrists and civil servants. Such persons may not exceed 45% of the members.

Category C: Municipalities or other natural or legal persons of private or public law may become members of the cooperative, if provided so in the statutes and, particularly, public hospitals or others involved in mental health, up to 20% of the members.

A person cannot become a member to more than one cooperative having the registered office within the same SMH and the same or similar purpose. No other members other than user-members are allowed in CCs as concluded by the wording of paragraph 7. To become a member, Article 2§4-6, Law 1667/86 on civil cooperatives (CCs) apply (see above).

Paragraph 5 provides that the members may be employees of the SC. Category A members may receive a remuneration connected with their productivity and working time. Category B members may work full or part-time with SCs, they receive their salary from the state and their expenses, if any, from the SC.

e. Financial profiles

Paragraph 7 provides that each member participates in the cooperative with one compulsory share. The law does not provide that the capital of a cooperative is variable, however it is concluded by Article 2§9 of the law on CCs. The statutes may provide for the

acquisition of five additional optional shares by the members with the exception of members – legal persons, which may acquire an unlimited number of shares, if the statutes provide so. All shares (compulsory and optional) have the same nominal value. The compulsory share may be transferred to a third person only after this is allowed by the Management Organ and the third person is qualified to be a member. The optional shares may be transferred without prior consent by the Management Organ to another member. The shares may not be inherited or bequeathed, however inheritors are given the monetary value of the shares.

Paragraph 12 provides that the capital of SCs is formed by the shares and the legal, statutory or special reserves. At least 1/20 of the net profits is withheld for the formation of a legal reserve, until the total amount shall reach the amount of the accumulated shares. In the legal reserve goes any other income not specifically mentioned in the law or the statutes.

A special reserve is formed by the payments of new members besides the value of their share (paragraph 8 provides that new members must further pay a contribution respective to the net assets of the cooperative). A special reserve may also be formed by the net profits to be distributed to members – legal persons, if they decide for it. The financial resources of SCs come also from State or EU grants, endowments, donations and income from the activities of SCs. Such grants and donations form another special reserve. Besides the above, the General Meeting may decide for the establishment of statutory or special reserves.

The remaining profit is distributed to the members, half of it in regard with the shares held and the other half in regard with the volume of their business with the cooperative (this distribution implies the distinction between surplus and profit).

In case of bankruptcy or dissolution and liquidation (Article 10§2), the special reserve formed by grants and donations is not allocated to the members (non divisible), but goes to purposes similar to those of the SC.

As with CCs, the financial year for an SC always ends on the 31st of December. At the end of each financial year, the Management Organ issues the Balance Sheet and the Income Statement, which are presented to the Supervisory Board 30 days before the holding of the General Meeting. The Supervisory Organ draws its findings and all relevant documents are presented to the General Meeting to be approved. The financial documents are published within one month in a daily newspaper of the prefecture of the registered office of cooperative. A summary of the Balance Sheet is published in a newspaper in Athens or the place of the seat of the SC (§13). No audit by accountants is provided for by the law, so it remains at the discretion of the organs or the statutes of an SC.

f. Organisational profiles

The law does not provide directly that each member has one vote (“one member one vote” principle). On the other hand it remains silent as to multiple voting by a member. We

may assume that the CC's legislation is applying and one member has one vote, while multiple voting is prohibited. One member one vote principle is the only rule for voting in second-, and third-level SCs (§15).

The General Meeting (§11) is the supreme organ of an SC. The quorum and majority requirements are the same as in CCs. Representation is prohibited, unless the statutes provide otherwise. Each present member may represent only one other member. In that case, the statutes may provide for a General Meeting formed by elected representatives of the members. Whenever a General Meeting is convened, the Mental Health Directorate is notified. At least five members may convene an extraordinary General Meeting.

The law (§§9-10) provides for the two-tier system, therefore there is a Management Organ of seven members elected by the General Meeting for a period of 3 years and may be prolonged for 3 more months. There are also seven substitutes. The Management Organ includes 5 members from Categories B and C and 2 members from Category A (legally valid). However, members from Category A may not hold offices in the Management Organ (chairman, treasurer, secretary-registrar). The members of the Administrative Organ do not receive a salary, only expenses. No representation is allowed at the meetings.

There is also a Supervisory Organ of three members elected by the General Meeting. A person cannot participate in both organs. Members from Category A cannot participate in the Supervisory Organ. If the members are less than 20, no Supervisory Organ is elected, unless the statutes provide otherwise.

The Management Organ may hire a manager or other employees, while the Supervisory Organ may hire one expert or consultant for the purposes of account and management control. The administrative, audit and financial control is a task for the Supervisory Organ, which has the right to ask for corrections if it discovers any violations of law or statutes or resolutions of the General Meeting or administrative irregularities and holds a General Meeting (extraordinary).

The members of the organs may not be relatives or spouses.

g. Registration (Article 1§§3, 6, 7, L. 1667/86)

As in CCs.

h. Control

Paragraph 1 provides that the Minister of Health (today Health and Social Solidarity) has oversight of the development of SCs. Furthermore, the Minister is competent to enact public supervision and control on SCs through the Directorate of Mental Health, which is a unit of the Ministry (see also above under f). The Minister also enacts expediency control (see above under c).

i. Transformation and conversion

As in CCs. Given the special nature and role of SCs, we may conclude that conversion is not allowed.

j. Tax treatment

Paragraph 17 provides that SCs are relieved from direct, indirect or other taxes except from VAT. Their statutes or their amendments are also exempt from stamp duty. Furthermore, the state and its organs may allow the use of movable or immovable property to Scs. Finally (§19), SCs enjoy all the benefits described in L. 1892/90 (as amended) on private investment programmes.

3.6. Legislation on housing cooperatives

a. Definition

Presidential Decree 93/1987 is the legislation applying to housing cooperatives. Article 1 reads that the Housing Cooperative (hence HC) is any cooperative providing in its statutes that its exclusive purpose is to provide houses to its members in urban or recreational (meaning secondary domicile for holidays recreation) areas or generally the restructuring or reformation or amelioration of housing areas for the benefit of its members only. If the purpose or the kind of the HC changes, it will be dissolved (Article 5§9).

b. Activities

Article 2§1 provides that HCs are distinguished as urban or recreational (for summer or winter holidays) cooperatives. Urban HCs are those which provide houses to their members as their primary domicile, while recreational HCs for secondary/holidays domicile. Both types may aim to the restructuring or reformation or amelioration of the respective housing areas. HCs may provide houses to their members either by building them using only one building enterprise, or by purchasing already built houses, or by distributing land so that the members individually have their houses built, or by combining the said methods. The statutes provide for one of the above methods of providing services to the members. If the method changes, the HC is dissolved (Article 5§9).

The HCs of all levels are private legal entities. They acquire their legal personality after the publication of the Ministerial Decision that approves their formation (Article 5§4, see below under c). They have no commercial status, since the decree remains silent on this issue. The decree does not provide for transactions with non-members. The decree does not make any reference to surpluses or profits, thus one may conclude that, considering the narrow scope of activities of an HC, there are no profits or surpluses at all. The resulting “surplus” from the cooperative’s activities is used to cover its functional expenses and only (see below under e).

c. Forms and mode of setting up

HCs are also distinguished by first- and second level. Housing Cooperatives are first-level and Housing Cooperatives' Unions are second-level (Article 15). A Union may be formed only by two or more HCs of the same kind (either urban or recreational). An HC cannot participate in more than one Union.

The procedure to set up an HC is complicated. It is initiated by a municipality either by its own motion, or after a petition of at least 25 individuals, or after a relevant application document by the Ministry of Public Works. Regardless of who initiated the procedure, the municipality draws an expediency report (that is, whether there are enough and plausible reasons to form the HC in that specific area) in collaboration with the competent authorities of the Ministry. If the requirements are fulfilled, there is a time limit of two months for any stakeholder to apply for membership in the HC. After the time limit expires, the municipality gathers the applications and convenes the applicants, who elect a temporary administrative committee to form the statutes. Within a time limit of 3 months, the municipality submits a file with the statutes and other data. If the time limit expires, the Minister may ask for the above documents and approve the statutes without the opinion of the municipality.

In case the procedure was initiated after a petition of at least 25 individuals, if the municipality does not keep the time limit of two months, the stakeholders may themselves go forward with the necessary steps described above and submit the relevant file with all documents to the Ministry.

In case at least 25 land owners wish to form an HC with the exclusive purpose of restructuring or reformation or amelioration of housing areas, they submit to the Ministry its statutes including at least the elements of Article 5§2 (e.g., name, seat, duration, purpose, opinion of the municipal council, etc.).

In case at least 25 individuals wish to form an HC with the exclusive purpose of purchasing ready-built houses, they submit to the Ministry its statutes including at least the elements of Article 5§2 (except from the opinion of the municipal council).

The Minister examines the submitted file and, if he/she agrees with the formation of the HC, either issues an approval decision, or amends, if necessary, the proposal of the municipality. If the file is incomplete, it is returned to the stakeholders with the necessary advise for amendments or supplements. The Ministerial Decision is published in the Government's Gazette. For any amendment of the statutes, the same procedure is valid (Ministerial Decision published in the Government's Gazette). Certified copies of all documents are sent to the HC, the District Court of the seat and the relevant municipality.

d. Membership

Article 6 lays down the conditions of membership; that is, members of HCs may become adult natural persons who have full capacity to contractual action and meet the terms of the statutes and legal persons. A person cannot become member to more than one cooperative of the same kind or if they are already the owner of a house or land

acquired through another HC. A person who was a member of another HC and was expelled or was finally convicted for crimes which are reason for expulsion cannot become a member of an HC. No other members other than user-members are allowed in HCs as concluded by the wording of the decree.

After the formation of an HC, no more members are allowed, unless in cases of death, replacement, withdrawal or expulsion of a member (Article 6§3). The only case for new members to enter the HC is that there is the possibility to cover more housing needs, if the General Meeting decides so, and the Ministry consents. On the other hand, a land owner may be compelled to become a member of an HC, if this is considered necessary for reasons of town planning (Article 20§§1, 2). The last article may be a violation of the open door principle.

To become a member, one has to apply in writing according to the procedure described above. The statutes provide for the constraints and impediments to becoming a member as well as the terms and conditions of withdrawal or expulsion of a member, and the minimum membership period. A member is expelled either by a common decision of the Management and the Supervisory Organs or by a decision of the General Meeting, depending on the reason of expulsion. The member has legal remedies against such decisions. A member must remain in the HC for at least one year. The statutes may also provide for a minimum period of up to five-years membership.

e. Financial profiles

Article 7 provides that each member participate in the cooperative with only one share. The share may be money, land or building or a combination of them. The value of the share may vary. We may conclude from the wording that the capital of a cooperative is variable (Article 6§5 – the share is returned to the withdrawing member).

Article 12§3.1 provides that the cooperative must establish a legal reserve, while the statutes may provide for a statutory reserve. The General Meeting may decide for the establishment of a statutory reserve. The legal reserve is formed by the shares, any donations and the accrued interest. The statutory reserve is formed by further contributions by the members after a decision of the General Meeting. In case of dissolution and liquidation (Article 12§III.3), if there are assets remaining in the legal or statutory reserve, they are either allocated to the members in accordance to the percentage of the share they hold, or donated to the municipality for charitable purposes.

According to Article 12§I, the financial year for a HC starts on the 1st of January and always ends on the 31st of December. At the end of each financial year, the Management Organ issues the Budget Estimation accompanied with a report by the Supervisory Board, which is presented to the General Meeting (Article 12§II.1). Within the first semester of each year, the Management Organ issues the Balance Sheet and the Statement of Accounts of last year accompanied with a report by the Supervisory Board, which are presented to the General Meeting to be approved (Article 12§IV.1). After such approval,

copies of the financial documents are submitted by the Management Organ to the District Court of the seat, the Ministry and the relevant municipality (Article 12§IV.2). There is no provision for audit by accountants, so it is at the discretion of the organs or the statutes (one may remember that the Minister approves the statutes).

f. Organisational profiles

Article 11§I.9 provides that each member has one vote ("one member one vote" principle) with the exception of an HC formed by land owners. In that case, each member votes according to the percentage held in the cooperative's reserve, which is indicated in the statutes. There is a legal quorum (Article 11§II.1) if at least 3/4 of the members are present or represented. Representation is allowed only with a notary's power of attorney.

If there is no quorum, there is another General Meeting after a week's time where any number of members is enough for a legal quorum. The majority requirements in all cases is 50% plus one votes.

The decree (Articles 8 and 9) provides for the two-tier system, therefore there is a Management Organ of at least three members elected for a period between 1 and 3 years. There are regular and substitute members. The employees, if any, do not participate in the Management Organ. The members of the Management Organ do not receive a salary, only expenses. There is also a Supervisory Organ between three and five members. There are regular and substitute members. Both bodies are elected by the General Meeting. A person cannot participate in both organs.

The administrative, audit and financial control is a task for the Supervisory Organ, which has the right to hold a General Meeting (extraordinary), if it discovers any violations of law or statutes or resolutions of the General Meeting or any jeopardy to the interests of the cooperative.

g. Registration

The Ministerial Decision approving the statutes is published in the Government's Gazette. Following that, the cooperative acquires legal personality. Article 5§6 provides that the original statutes are kept with the Ministry of Public Works, while certified copies of all documents are sent to the HC, the District Court of the seat and the relevant municipality. The same procedure is followed in case the statutes are amended. The Ministry also keeps a Register of Housing Cooperatives, where each HC has its own file with all necessary data.

h. Control (Article 13)

The Minister of Public Works approves the statutes of HCs and enacts public supervision and control on them. The content of the supervision and control concerns the legal function of the cooperative and its assistance to achieve its goals. More specifically, the Minister controls a) whether the HCs abide with the legislation both in their statutes

and their amendments or supplements, b) whether the functions conform to their statutes and the resolutions of their Organs and c) whether there are any administrative or financial malfunctions. The control may also be done after a resolution of the General Meeting. The control is enacted either by the Minister or by the courts or may be delegated to other public authorities.

i. Transformation and conversion

Article 20 provides for the compulsory merger of two or more cooperatives for reasons of public policy. The law does not provide for transformation of CCs to other types of entities.

j. Tax treatment

There is no special tax treatment for HCs, only Article 23 provides for several town planning incentives for their formation.

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4. Comments on national law on cooperatives

As already mentioned in the previous parts of the present report, there is no national legislation implementing the SCE Regulation in Greek legal order. Therefore, there can be no comparison between such legislation and national cooperative legislation. The conclusions from the information collected by the interviews and personal opinion form the basis of the following remarks as regards national cooperative legislation. As a general critical comment, one may say that the legislation is very fragmented and the different regimes create a different and unequal footing for each type of cooperative. This is true especially if we compare the pieces of legislation presented above under C.

Before going on I may make some brief comments on the legislation for housing cooperatives. The detailed and chaotic conditions for their formation are very restrictive and make it a difficult task. Moreover, the formation is not certain, since it is up to the discretion of the Minister. One should emphasize that the criteria for the ministerial consent are not specific and objective, but ambiguous and subjective (general housing policy, general housing development etc.). The open door principle is also violated under the excuse of the same criteria. It goes without saying that the Greek legislation is not suitable for the development of housing cooperatives, is rather strict and anti-cooperative and should be abolished.

Law 2816/2000 on rural cooperatives is definitely the best Greek legal instrument for cooperatives. It contains all those elements which make cooperatives a modern enterprise without blurring their special characteristics. It is worth mentioning that the SCE Regulation positively affected the law. As referred in its Explanatory Memorandum (all draft laws in Greece include an EM at the voting procedure in the Parliament), Law 2816/2000 has copied in many points the SCE Regulation during its drafting. As a result, the law provides for investor members and business with non-members, it distinguishes between surplus and profit and gives the opportunity to cooperatives to form other entities, even

companies, if they consider it necessary to serve their interests. For these reasons, Law 2816/2000 is a model law suitable for cooperatives, creating a proper environment for their well-being.

Naturally, there are points to be amended, so that the cooperative model becomes more attractive. For instance, the members of the Administrative Organ should receive remuneration for their services rendered to the cooperative, so that such administrative posts become more interesting for the members. In order to avoid the abuse of such provision, the remuneration may be connected to the volume of annual business and the financial results of the cooperative. Secondly, the registry of cooperatives should be strictly controlled every five years and cooperatives with fewer members than legally provided or no activities should be compulsorily wound up and liquidated. The number of members and the activities must be the criterion of existence of a cooperative. Moreover, the cooperatives themselves should compulsorily control the registry of their members and delete all non-active members or change their status to investor members.

The major legal shortcoming for agricultural cooperatives concerns the status of the employees, which is regulated by Common Ministerial Decision 52800/2006. All employees, with the exception of the first two years of their term, are considered as permanent staff occupying “organic posts”. They are hired after a public proclamation. This status is not flexible for the employer cooperative. Moreover, it is very difficult to dismiss an employee. While in the private sector businesses, the employment relationship terminates after a written notification and payment of the legal remuneration to the employee (the courts only control such termination for abuse of right by the employer), in the case of an agricultural cooperative, the procedure is rather inflexible. The termination of employment has to be approved by the Administrative Organ and furthermore to be ratified by PASEGES.

There is also a Collective Labour Agreement between PASEGES and OSEGO (representatives of employees) governing the relationship of agricultural cooperatives and their employees (Article 33§1f, L.2810/2000 – another point that should be amended). One may conclude that PASEGES plays an important role without itself being a commercial enterprise and, moreover, without being the employer paying the salaries of the employees. We face a rather unique situation where the cooperative employer is not able to negotiate at an individual level with its employees. For this reason, one should examine whether first-level cooperatives might be able to become members in PASEGES.

In any case, one may not doubt that Law 2810/2000 is a rather modern and cooperative friendly piece of legislation. This is more obvious, if one compares the situation for the other types of cooperatives, which is quite different. More specifically:

Civil Cooperatives

The prohibition for acquisition of more than five optional shares causes problems, because it limits the equity capital and cash flow of the cooperative, especially when at the

same time there is a prohibition for investor members as well. Thus, if a cooperative needs capital injection and does not wish to go for a bank loan, it has to “transform” to consumer cooperative (100 optional shares per member) and offer member status to Public Law Legal Persons, that is, state entities (unlimited number of shares). Therefore, the policy-makers may examine an amendment so that an unlimited or a great number of optional shares per member could be acquired.

Another amendment may concern the withdrawal of members and their shares. If a member withdraws, he/she may receive only the value of the compulsory share. As for the optional shares, the withdrawing member should find a buyer to purchase his/her optional shares; otherwise, no money is returned by the cooperative. Thus the equity capital will not suffer abrupt reductions that may jeopardise the cooperative. To this end, investor members should be allowed in civil cooperatives as in agricultural ones. The pool of potential buyers will enlarge as well, as non-user members are a potential source of capital.

The one member one vote principle secures the democratic administration of the cooperative; however, it would be preferable if a member holding a great number of shares could have up to three votes. Unfortunately, such an amendment is not included in the draft law (see below comments on cooperative banks).

There is double taxation for profits, since the law does not make any distinction between surplus and profit.

Though the law provides for the duty of the State to procure for the development of cooperatives, there is no such attention. The Cooperatives’ Council was not formed, though provided for by law, and cooperatives cannot benefit from its function. In any case, civil cooperatives try to educate and train their members and the members of their organs organising seminars and conferences.

Cooperative Banks

Law 1667/1986 is totally outdated. Cooperative Banks are not able to function under such regime. With the exception of specific provisions to take into account the cooperative principles and particularity, there must be the same legal environment as for the banking sociétés anonyme, so that all banks function at an equal footing.

No investor members are allowed, there is a restriction to the number of shares per member, the one member one vote principle is rather restrictive for a bank, the volume of business with non-members is restricted, there is a restriction to the kind of banking services they may offer, and there are restrictions to membership.

It is characteristic that ESTE (Union of Greek Cooperative Banks), thinking that the Regulation may serve as an instrument of harmonisation of cooperative legislations in Member States, invoked article 59§2 to persuade the Ministry of Economics as to the possibility of multiple voting by a member, but it had no success.

After extensive lobbying, certain amendments to L. 1667/1986 in connection to the Cooperative Banks are included in a draft law to be presented to the Greek Parliament within April 2010. Thus:

a) Each member may acquire shares up to 2% of the equity capital.

b) The pledge of the shares is permitted up to a limit to be imposed by the Bank of Greece.

c) The bank may issue a bond loan with bonds convertible to shares.

d) A member may have up to five votes or 2% of the voting shares if such percentage is less than five votes. The statutes may provide for less than five votes per member.

e) A cooperative with more than 1,000 members may keep an electronic registry instead of a book in material form.

f) The Administrative Organ has at least 7 members. Following a decision by the Administrative Organ, a three-member Control Commission is formed, composed by its Chairman (independent non-executive member with thorough knowledge on accountancy and auditing issues) and two non-executive members.

g) The election procedure of the Administrative Organ changes to become more flexible and useful to the function of cooperative banks.

h) The incentives provided for in L. 2810/2000 for merger of agricultural cooperatives are offered for credit cooperatives as well.

Social cooperatives

The legal regime on social cooperatives was innovative, however it is now outdated. The restriction to the membership is rather strict and does not allow social cooperatives to provide services to more members with social needs. Therefore, either the categories of members should open to other people as well or the percentage should be abolished or, at least, the percentage should remain in force until the first General Meeting. It is true that social cooperatives base their existence to their relations with the State. The opening to more members may give to a social cooperative a potential to stand alone in the market.

The supervision is incomplete. Due to the shortcoming of the legal regime, a closer supervision would help social cooperatives to be confident that their activities are legal and their Organs would not be reluctant to go forward to further activities to the benefit of the cooperative. On the other hand, the illegal activity of an SC would be castigated without causing problems to the reputation of the whole sector.

On the other hand, there are benefits for social cooperatives. The mental patients have a special employee status and receive a non-taxable remuneration for their work in the cooperative. Other employees are governed by the common Greek labour law. The social cooperatives do not pay income tax.

As a final conclusion, one may say that the best solution for cooperatives in Greece as regards the legislative environment would be the abolishment of all laws and the adoption of a single law for all types of cooperatives. Law 2810/2000 with several necessary

amendments and special provisions for the banks would serve that cause. Furthermore, the adoption of the necessary provisions for the implementation in the national legislation of the SCE Regulation would add a tool in cooperatives' hands. However, I have to insist that the major shortcoming for cooperatives in Greece is not legislative; it is the mentality of people and the wrong perception of cooperation and cooperative institutions.

HUNGARY

By András Kelen

SUMMARY. 1. Legal predecessors. – **2.** Status quo. – **3.** Laws that apply. –**4.** Legal implementation of Directive 2003/72/EC. – **5.** On having a distinct law for cooperatives in Hungary. – **6.** Membership rules. – **7.** Interest bearing preferential shares. – **8.** Circumstances of Launch. – **9.** Remarks on Policy-making. – **10.** Visibility. – **11.** Literature

1. Legal Predecessors

In the context of SCEs, the Committee of the European Union has determined that there will be no coercive harmonization of national policies on cooperatives. It is the voluntary following of best practices and best models that is to be expected when designing the national implementation of the 2003 Statute on European Cooperative Societies. The SCE legal form enables members – natural or legal persons – to carry out economic activities in a joint manner while maintaining their independence. European cooperatives will be registered with at least €30.000 capital; the cooperative can fulfil its mission throughout the full territory of the EU in identical legal form and structure.

The 2006 Act on Cooperatives already empowers foreign-registered coops to exercise unrestrained business activities in the country stating that a cooperative established outside Hungary shall have the same rights and obligations as any cooperatives established within Hungary. This norm foresees branches to be registered in Hungary. With the arrival of the 2003 EU Statute then and its local implementation there is no need any more to develop affiliates in case of extending their scope, that is, if they start pursuing economic activity abroad. Besides requesting registration under the new European legal form, an SCE also can be built with the merger of existing coops from different countries.

2. Status Quo

In Hungary there are two registered SCEs (FEUVA, Fantáziaország), they are in full gear. Another (Ha-Mi) is in the pipeline, having filed for registration a few months ago. According to law practice, after having filed for registration, cooperatives can start economic activity. Ha-Mi is on the go, they are already well-known in their region and they have started issuing a local *surrogate currency* in order to promote inner commerce (barter) and mobilize stockpiled surpluses at member firms.

In proportion to the size of the country and the overall number of economic organisations, I do not deem this tally (two registered SCEs, another in the process of getting registered) low. Especially so, that SCEs can start operating before legal registration.

The registered SCE, FEUVA (scattered all over the country) is an active cooperative with a clear-cut strategic aim to mobilize *social resources* among individual car-repairing workshops. Workshops continue to preserve the position of independent economic operators, but they will start exploiting business opportunities resulting from networks.

FEUVA has had good cause to register as an SCE: as a strategic goal they have in mind to extend activities to the surrounding regions of Hungary where simple car mechanics and their clients historically speak the Hungarian language. It is remarkable that their appearance in the Official Journal of the EU indicates a European Interest Grouping. When asked about this odd circumstance, the response is that at that time they had commissioned an established legal firm to do the job and as there is no live working connection to that bureau, they cannot comment on the cause of this unintended consequence.

Although *FEUVA's* inner commerce and performance (turnover of the coop itself as opposed to that among the members) is not yet considerable, I got convinced that their business model is justified, sustainable and their economic future is secured.

The second full-fledged SCE ("*Fantáziaország*" from East-Hungary) is a project entity: they solicit members, investors and projects with the aim of pooling resources for mutual benefit. They are brand new so there are no figures as to turnover or inner commerce, as yet. With maturation they might deliver an interesting case study as to the role of inverting members in cooperatives.

The third SCE (second in filing for registration, *Ha-Mi* from the Western regions of the country), still in the process of registration, is an inter-regional *time-bank* aiming at multilateral exchange or barter amongst member firms (the settlement of individual accounts is done according to invested working time rather than volatile market value). It is interesting to observe, however, that in sharp contrast to other time-bank initiatives scattered all over Europe, they have in focus not the *inactive strata*, by no means the long-term unemployed or the underemployed. They clearly aim at city entrepreneurs and local SMEs (extending to neighbouring Croatia and Austria) as cooperating members.

Time-bank therefore is perhaps not the proper denomination of what they intend to carry out because time-banks apply mainly to the model of *community self-help* as an important community building opportunity to utilize local talent and other latent underutilized skills as long as they do not find a regular employment outlet. Time banks weave and knit their network in order to incubate and develop members' marketable competences.

As to *Ha-Mi* SCE, their multilateral barter among the established entrepreneurial members of the cooperative is envisaged as an auxiliary channel to boost the local

economy by “selling” unsold products and services in a complementary manner. In order to achieve this extra “selling”, they are in the process of issuing an alternative local currency in order to help economic activity in the region get boosted.

As not all aspects of monetary policy are clarified yet, their registration and acceptance is not without hurdles. Although they simply emulate existing initiatives from Europe, in my judgment they seem not to have decoupled their envisaged currency from the national tender in a satisfactory manner – and this causes a headache for the Supervising Authority of Financial Organisations. *Ha-Mi* requires members to make *deposits* in the *nationaltender* and speak about their alternative money as backed up by genuine reserves. From a financial point of view, this referral to “reserves” serves merely marketing goals – a time bank or a multilateral exchange facility does not need reserves at all for functioning very well. *Trust* alone should make do and trust ought to be derived from networking instead of hoarding reserves. I emphasize, as many other initiatives are burgeoning all over Europe, especially in the regions and Bundesländer of Germany, their subsequent registration is not questionable.

3. Laws that apply

Hungary is a country with a written constitution. Art. 12 of the Hungarian Constitution makes explicit mention of cooperatives: “The state supports cooperatives based on voluntary association”. This is ground-breaking because of the occasionally not-so-voluntary past of the cooperative movement. Let me point out at the same time, that with the elapse of the Stalinist era back in the 1950s, this dichotomy of voluntary/involuntary boils down to the percent and share of state support. If statutory help does not reach cooperatives then we can speak of a fully voluntary model. Whereas a limited degree of financial bridges that channel taxpayers’ money toward cooperatives can also be deemed as a form of state interventionism that might one day compromise the voluntary character of associating members.

Lawmakers have also made their try in several waves to constitute the most adequate legal form of coops: 1992. I. law on cooperatives; 2000. CXLI. law on the new cooperatives; 2006 X. law on cooperatives. This latter law, detailed as it is, on cooperatives is clearly of the *ius cogens* sort. It is not my task to comment on whether the law could be further improved (be even more detailed) or has already reached its maturity. It is nevertheless clear that with the opening of the multinational dimension, lawmaking on cooperatives is aiming at supportability on the European level. As to laws applying:

-The Hungarian Act (2006. LXIX) on the European Cooperative: this law is the strict translation of the EU Regulation (Council Regulation No 1435/2003 on the Statute for a European Cooperative Society) without alteration or adaptation. Therefore, I do not give details here, I simply furnish the English and the Hungarian text in enclosure.

- Bylaw (124/2006. V.19.) on the disbursement from the cooperative's mutual fund. This bylaw allows to the tune of 6,5 percent **to put profits tax-free** into the distinguished sort of **reserve fund**. Together with the very limited tax sheltered status of **members' loans** these two features are currently the only tax advantages coops are offered in this country.

-The Hungarian by-law (141/2006. VI. 29.) on social cooperatives: these employment generating coops are an important policy tool in the direction of activating wide strata of undereducated people in deprived areas. Social coops cannot have investor members, only contributing members in person. As opposed to mainstream coops, they are acknowledged as having community-interest status entitling them to tax-deductible donations. There are many social coops in the country, but they could not in a single case reach a sustainable business model. Thus, the current legislation and practice can be deemed as worthy for starting them as competence incubators, but unsatisfactory to pushing them over the threshold of an institutional status.

4. Legal implementation of Directive 2003/72/EC

I can ascertain that the SCE Regulation has not engendered a new generation of cooperative laws in Hungary. I enumerate the pertaining legal constructions:

- Act LXIX (2006) on the European Cooperative Society, Magyar Közlöny Nr: 2006/95.page:07792-07806
- Act V. (2006) on Company Transparency and Liquidation, Magyar Közlöny Nr: 2006/1. page: 00099-00161
- Act XXII. (1992) on the Labour Code; law XLIX. (1991) on Bankruptcy and Liquidation;
- Act C. (1990) on local taxes; law IV. (1959) on the Civil Code; law III.(1952) on litigation.

5. On having a distinct law for cooperatives in Hungary.

In contrast to Denmark, where there is no law on coops and there still exists a vivid scene of various cooperative organisations, Hungary has a great past, a ramified current ecosystem of laws and by-laws, but in practice a less colourful scene. The distinctive feature of cooperative association is certainly the voting pattern: one member-one vote. Let me remark: in Hungary, it is also allowed to vote through a representative. Some influential lawyers hold the view that this one-man one-vote pattern is the only *differentia specifica* of the cooperatives. Ignoring that cooperatives build up a movement, they claim that company law ought to have a single paragraph more specifying companies where the one-man one-vote rule applies irrespective of the size of their share portfolio. Thus they

oppose having a special law on coops and they still keep opposing it being augmented in any further direction. This stance makes itself especially felt when it comes to lobbying for tax advantages. I reiterate, it is the mutual fund and members' loans that carry a limited tax shelter, as of now there is no other tax break for cooperatives.

6. Membership rules

Cooperatives are voluntary organisations based on open membership. Minimally 5 members can create a coop, each purchasing at least one single share. Shares entitle for proportional profit sharing but not proportional voting rights. The organisation's steering committee is composed of the Assembly and a Board consisting of at least three coop members. The board is elected by the Assembly and it is the board that gives the President of the cooperative. The statutes can prescribe a position for a CEO and can also permit electing non-members into the board.

An important component of the Hungarian cooperative movement is the sector of financial coops or mutuals. We have a three pillar pension system: employees can opt for the Social Security Authority for handling their retirement benefit, but they can also opt for a private pension scheme, too. This latter is run by financial cooperatives where members are owners. Actually, the entire private pension system is based on mutuals and not on insurance companies where clients acquire entitlements without ownership rights. Among these mutuals there are a few with an active membership where self-governance is important and practiced in every detail. The vast majority of financial coops, however, comprise hundreds of thousands of employees. Handling their retirement benefit is a task that goes beyond the limits of a cooperative.

7. Interest bearing preferential shares

Membership loans that carry an interest are allowed, but this is not compulsory and do not entitle the grantor to any management influence. Investors can also enter coops (save for the legal form of social cooperatives which aim at finding employment for their members) to a certain limit – up to the extent of remaining a minority (10 percent) in decision-making and policy-making. Each non-user member will be offered a contract, resulting from the approving decision of the General Assembly. Investors can subscribe to investment shares (up to the extent of remaining under 30 percent of all shares) that are not linked to personal working contribution. Economic transactions with third parties are permitted without limitation.

My scholarly observation is that, in this respect, lawmakers in Hungary are well-ahead of facts: ideal typically, our coops by far do not make use all or most of these business

options (which are by no means a counter argument for having this specific detailed legislation). Third parties do not deal typically with our coops as investors, but only as clients; the issuance of bonds as a way of acquiring capital is not practiced, too.

For cooperatives, *capitalisation* is nevertheless a lurking danger. This could be the case when the organisation forfeits its collective and self-governing character and effective direction slips into the hands of investors. This de-mutualisation can occur when decision-making bodies continue as figurehead only due to say, the election of a powerful outsider into the board. This dynamic could manifest itself in the transition into a limited company or a shareholding company or – and this is perhaps more adequate to our circumstances – the factual (two-tiers) organogram of the organisation loses its *bottom-up network* character. However, this ominous outcome of winding up without succession is not yet fulfilled in the modern, second-wave genuinely voluntary cooperatives in Hungary.

In case of bankruptcy, cooperatives behave like legal persons and limited companies – unlike in the case of nonprofit organisations, their legal liquidation can be asked for. Remaining assets belong to members after having compensated all creditors. After liquidation, the distribution of the reserve fund proceeds according to different rules: the reserves go to the federation or alliance. This latter constraint clearly underlines the movement character of coops.

8. Circumstances of Launch

When interviewed about the raison d'être to set up an SCE as a loose set of 35 individual SMEs Ferenc Kovacs, the chief executive officer of the sole Hungarian registered SCE FEUVA has pointed out that they have has a strategic goal with this all-European legal form. Looking into the future and preparing capacities for later business activity to be reinforced with European and state-level grants – this is a recurring motivation of the founding members.

Currently, the inner turnover of the cooperative is very small. The same is true for their mutual fund. As of now, the only motivation for a member is that, taken together, they can get cheaper prices and more prestigious clients. However, the cooperative intends to extend to the adjacent regions in Slovakia and Romania where the Hungarian language is well-understood. In their services the language barrier is important so the neighbouring regions are an attractive business goal. This explains their choice of an inter-regional or all-European legal form of an SCE.

Another strategic aim is to purchase the individual firms (family workshops) by the SCE. Otherwise the owners would never sell their firm not even when they retire. Prompted by a question as to what extent this expectation has already been fulfilled the response was that, as of now, no change of ownership has yet been concluded. But as members retire and as their perception of a company's value develops they will certainly prefer ceding

ownership to a cooperative where they maintain their share ownership to simply let their firm decay and go out of business.

Small and medium size entrepreneurs are not really sensitive to economic terms such as growth, interest and company value. They are also not open for investors either when it comes to selling their company. This is due to the fact that it is still self-employment that is paramount in their mind when having set up their company and this mindset also applies as they run their company. Family businesses would never have relinquished their ownership rights. But if it is the cooperative that solicits for the company and the retiring former owner will retain his shares in the coop – well this seems to be the one and only route to save their assets for the sake of the collective.

As of now, the competitive advantage of having the cooperative form is in the ability to bargain for better prices for their members against contractors and logistical sub-contractors. As for the near future, enhancing internal business services and identifying their core common business competences is the path of development for the FEUVE SCE. If they could enhance and deepen their internal and mutual business services they could end up as a big European cooperative.

9. Remarks on Policy-making

It is a widespread opinion among experts and engaged activists of the coop movement in Hungary that it is the neoliberal economic and financial policies of the last decade that keep the creation of new cooperative organisations at a low level.

Why *Tourism Destination Management* initiatives, for instance, are all pooled into associations instead of a cooperative – which could be a natural option given the fact that associations as nonprofit organisations are not supposed to pursue economic activity! Why then *industrial clusters* – centred usually around a multinational company - do not find the legal form of a coop more suitable, even clusters with a considerable amount of inner services for members do not opt for this solution? It is undeniable that coops are not fashionable nowadays, their movement, although existing, is not attractive. In a rash moment the answer is always that the former coops in the Communist era – though flourishing - were not really voluntary ones. I am not satisfied with this response.

At the same time, when coops are not fashionable, nobody denies that part of the malaise the Hungarian economy suffers from could be cured exactly by the help of organisations that build community, cooperation and integration. Exactly these forms are badly missing today. Various models of communal self-help is the antidote for nearly all the shortcomings of capitalism. Unfortunately, the associative modes of coping and interest articulation in general take time to learn. Complementing multinational and big companies, SMEs and other *associative forms of coping* could bring about together a free market with less imbalances of capitalism. The learning process of how to *localize* the

economy and how to leave behind individual coping is slow and full with occasional backlash. However, this route cannot be spared when trying to think about setting up more cooperatives as the antidote against the excesses of globalisation.

I am, however, convinced that this is a partial picture only. Cooperatives and the overall social economy can only be conceived as a pocket of the economy for compensating the losers and balancing the disequilibria caused by occasionally unbridled competition and advancing globalisation. Entities of the social and solidarity economy should by no means remain atypical but mature and full-fledged. The social economy (eminently its incubating function) is not high enough on the political agenda because in labour issues people are acquiescent and accept unemployment. The rate of unemployment is not much higher than the European average; this has been the case even at the peak of the current financial recession. Cooperatives, especially in the legal form of social coops could exert a definite employment generating function. This employment generation is due to the known fact that core labour market competences can be found in a network much earlier and easier than for individual workers alone.

At the same time, the rate of *inactivity* is particularly high in this country. Unfortunately, it is rather the so-called social cooperatives that can serve as an antidote on this particular employment problem. SCEs are not meant to really help on this latter particular issue. This can be cited as an obstacle that prevents them from getting higher on the current political agenda.

Another stumbling block that makes itself especially felt in the registration process is the obscurity of legislation on workers' participation. SCE regulations have been created with regard to *employee participation* in harmony with existing Community legislation. This sophisticated lawmaking – important as it may be, but not necessarily pertaining to the very essence of the cooperative business model because coop members are not workers but owners - is perceived by law professor Maria Réti to be somewhat complicated for the judges in the Registry Office to perform registration promptly and smoothly.

It is conspicuous to observe that the practical success of the legal form of European Cooperatives seem to be predicated on normal or good state-level links. In Eastern-Central Europe this precondition is not always fulfilled! There are tensions of all sorts between countries, historic ones and current ones alike. If we observe the scattergram of Hungarian SCEs, we can conclude that those that aim at cross-border cooperation are established in the border regions where interstate relations are excellent or flawless. Whereas problematic directions (in case of Hungary the Slovakian and Ukrainian directions) seem to hamper the very establishment of European Cooperatives.

As to best practices I should cite once more the case of financial mutuals. They constitute one pillar of the Hungarian pension system, the private one. (This pillar is next to the state-run pillar and the complementary pillar run by multinationals). This pillar is not operated by insurance companies, but handled by financial coops. That means clients are at the same time owners of the organisation. I do not cite this case here because I would

deem this sort of ownership was especially paradigmatic or successful. Hundreds of thousands of employees can at best elect representatives to exert their ownership function. This is certainly not the bottom-up way of management where self-governance or participative leadership would be imaginable at all. It is rather the very variety in ownership structure alone that is significant in that particularly sensitive field of the financial system as pension insurance is. This diversity ensures room to manoeuvre and the liberty of choice for Hungarian employees.

Still far from being a mature institution, artists' participation in social-political issues can also take the shape of a European cooperative. Because the original mission of coops centre precisely on the ideals of community as opposed to individual accumulation of wealth, the *modus operandi* of European cooperatives is also suitable to give shape to artistic self-expression within the framework of *corporate social responsibility*. It is a new initiative that exhibition projects of international collaboration explore the potentials and pitfalls of collective artistic production – instead of individual self-expression. Thus, the concept of *reciprocity* and democratic distribution of goods instead of concentration of capital can seamlessly be based on the personal and financial contribution of the members and on local communal values, as well.

When looking out for best practices in the SCE-scene, I can single out and refer to an intriguing international European project dubbed "Le Grand Magasin" http://legrandmagasin.coopseurope.coop/Konzept.html that started with opening and operating a shop in Berlin-Neukölln, which sold the products of participating cooperatives. In addition to shopping, the shop was the site of information exchange, providing publicity for the alternative economic models forming the backbone of the cooperatives. Diverging from the Berlin experience (the retail of coop products), the Hungarian stage of the project – a series of exhibitions – took place in a niche dominated by the still prevalent impact of post-war nationalization and the economic hardships caused by contemporary economic recession. This SCE is not registered in Hungary, but local artists consider joining.

10. Visibility

Having perused the pertaining literature I could identify state launched measures to promote cooperatives on two counts:

1) there is a webpage launched by the Prime Minister's Office back in 2004-2005. This website comprises articles and studies commissioned by this high office in order to start a consensus-finding process within experts and practitioners as a preparation for the law to be enacted in 2006 for the Cooperatives in Hungary. This site is rich in content, but not interactive and there are no updates whatsoever. With the subsequent successful (unfortunately full of compromise) legislating, no further measures were taken to

popularize or disseminate the changes, let alone the enactment of the brand new all-European legal form of SCEs.

State administration in Hungary consists of municipalities, middle level self-governing districts, and the central public administration – none of them have ever resorted to PR-measures or any other communications venture in order to popularize the new all-European legal form of associating independent business operators. The same is true for traditional coops, too. I am convinced, however, that with the arrival of the new paradigm of the "social economy", with special regard to its employment generating function, this dire state of affairs can change for the better. Especially so, because social cooperatives address the needs of the wide *inactive* strata, those discouraged ones who do not even register as unemployed.

2) The National Employment Foundation (OFA) was established 1992 by the Ministry of Labour. The Hungarian Government entered as "stakeholder", when the company transformed to public foundation. The Ministry of Social Affairs and Labour plays the role of professional supervision over its activities. Its mission is to contribute to the reduction of unemployment and the promotion of employment, through which it plays an important role in the system of employment policy institutions. Well, this foundation has a time-honoured program subsidizing and promoting social cooperatives. We have a handful of these legal entities in Hungary. Unfortunately, none of them could get institutionalized, that is, none of them could yet leave behind the stage of relying on grant money by developing a sustainable business model.

Getting beyond state-launched initiatives, we have in Hungary a cluster of schools with a curriculum on nonprofit organisations, cooperatives included (whereas the nonprofit constraint alone may not apply for coops, within the paradigm of the "social economy" cooperatives and nonprofits alike constitute the third sector). Even business schools start coming out with curricula on management for nonprofit organisations. As to the paradigm of the social economy, however, where cooperatives belong, the academic interest is not yet mature enough.

Scholars have participated in the model design for the *Ha-Mi* SCE and *Fantáziaország* SCE alike. These cooperatives have exclusively well-to-do entrepreneurs as members from a quite wide region encompassing three countries. Their principal aim is to mobilise members' excess commodities and services by issuance of a regional certificate called "*Kékfrank*" (referring to the favourite wine of the region). This parallel currency, sort of a surrogate or substitute for the national tender, is meant to lubricate demand by enabling members (and their employees, as well) to draw part of their salary and get compensated in *Kékfrank*. This new alternative currency is intended to use up surpluses and mobilize excess production that "fiat money" (the national tender) cannot do. Thus a boosting effect for the overall economy is expected.

As to business support services, the scene is rather underdeveloped. Individually tailored advice is to be gained only from academics. With the sole exception of

accountants specialized for cooperatives, there are no dedicated financial services or agencies, let alone management consulting firms in this field. The same applies to the overall nonprofit sector.

While difficulties at the registration process may impede a kick-start for this newfangled cooperative business model, its attractiveness will be certainly advantageous to bring back other emerging new coops into the mainstream of economic endeavour in Hungary where this legal form – the voluntary cooperative as opposed to the somewhat coerced ones in the ancient regime – is still not fashionable.

As far as *normality* is concerned, it is important to stress that globalisation and competition ought to be the *mainstream* framework of economic endeavour. In order then to *balance* and *compensate* the detrimental outcome of capitalism, we need complementing forms, too. Such as cooperatives of all sorts, entities of community self-help, models of self-governance, workers' participation, etc.

As to public relations, I can refer to important cases of *grant-making* with a successful national-level impact where the policy goal of the grant was to enhance the communication on cooperatives. In one case the social cooperatives were put in the focus (National Employment Foundation, OFA). The other initiative is a wave of prizes earmarked for social entrepreneurs. The Boston Consulting Group was pioneering in this respect with their competition; then an Austrian initiative (*SozialMarie* prize for social enterprises) was prompted to extend its scope to Hungary; and a business school (Budapest College of Management) has also come up with the so-called *ProBono* prize, which can be won by one of the alumni who set up a sustainable social enterprise of their own.

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ICELAND

By Ivar Jonsson

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Icelandic legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Icelandic legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Icelandic legislation

1.1 Source, time and modes of implementation

SCE Regulation 1435/2003 was implemented with Act no. 92/2006 respecting European Cooperative Societies on 14th of June 2006.[79]

1.2 Structure and main contents of the regulation

Act no. 92/2006 consists of six chapters and 30 articles. Chapter I describes its general provisions. Article 1 observes the scope of the Act and states that the provisions of the Council (EC) Regulation No. 1435/2003 of 22 July shall have the force of Law in Iceland in conformity with Protocol 1 concerning universal alignment to the Agreement on the European Economic Area, cf. Act No. 2/1993 respecting the European Economic Area, whereby the Protocol is legalized.

Article 2 regards book-keeping and procedures concerning annual accounts.

Article 3 states that a European Cooperative Society (SCE) is authorized to have the words “European Cooperative Society” in its name and to use the abbreviation SCE/esvf (esvf = evropskt samvinnufelag).

Article 4 declares that “The Act having an identical name applies to the participation of employees in European Cooperative Societies”. The referred Act was implemented in 2007 as Act 44/2007 respecting Participation of Employees in European Cooperative

[79] See the English translation of Act 92/2006 at the Ministry of Economic and Business Affairs: http://eng.efnahagsraduneyti.is/laws-and-regulations/nr/2875

Societies from 27th March 2007 (Log um adild starfsmanna að evropskum Samvinnufelogum).

Chapter II concerns establishment of SCEs regarding participation in the establishment of a SCE and participation of financial concerns in the establishment of SCE by means of merger. Furthermore, it highlights issues of certificates upon the establishment of a European SCE by merger and the right to withdrawal from a take-over company.

Chapter III concerns registration of SCEs. Article 9 states that the Register of Cooperative Societies is operated by the Director of Internal Revenue (Rikisskattstjori) and the DIR will register SCEs in Iceland.

Chapter IV concerns procedures regarding transfer of registered office of a SCE. The chapter is wrongly numbered as chapter IX in the official English translation. A European Cooperative Society supervised by the Financial Supervisory Authority is not permitted to transfer an office from Iceland to another State in the European Economic Area, a Member State of the Convention of the European Free Trade Association or in the Faeroe Islands in case the Authority opposes the transfer within two months from the publication of a notice of transfer in the “Legal Gazette”.

Chapter V concerns organization of SCEs. It refers to the SCE regulation 1435/2003, Art 37-44, regarding one and two tier systems. In two-tier management system there shall be at least three persons on the management organ and at least three persons on the supervisory organ. In case of a one-tier system there shall be at least three persons on the management organ.

Chapter VI concerns other provisions such as members’ proposals, authority’s calls for society’s meeting, right to appeal registrar’s decisions regarding registration of a SCE and penalty provisions.

Art. 2 makes it easier to establish a SCE as it “can obtain authority from the Register of Annual Accounts operated by the Director of Internal Revenue to enter its books in a foreign currency in conformity with the provisions of Acts on Book-keeping and to prepare and publish its annual accounts in a foreign currency in conformity with Acts on Annual Accounts.”

Concerning restrictions on the activities of SCEs, Art. 6 restricts activity of SCEs in the financial sector as: “A concern subject to the supervision of the Financial Supervisory Authority is not permitted to participate in the establishment of a European Cooperative Society in another State in the European Economic Area, a Member State of the Convention of the European Free Trade Association or the Faeroe Islands by means of merger if the Financial Supervisory Authority opposes this after completion of study due to the danger of services interruptions in the payment brokerage system or activities in the financial market or having regard for public interests in other respects provided that the Financial Supervisory Authority approves this prior to the issue of a certificate in

accordance with Art. 7 to the effect that all acts and formal items before the establishment of a European Cooperative Society by means of merger."[80]

Finally, it should be highlighted that the Act no. 92/2006 respecting European Cooperative Societies does not contain any provisions that are particularly aimed at enabling or facilitating the formation of SCEs, as required by article 78, paragraph 1.

1.3 The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The Register of Cooperative Societies in Iceland administers a transfer of registered SCE office to another State in the European Economic Area, a Member State of the Convention of the European Free Trade Association or the Faroe Islands. In case a Court of Law has upheld the decision of the Financial Supervising Authority to oppose the transfer of a registered office, the Register of Cooperative Societies shall dismiss the application (cf. Art. 13). Furthermore, in the case of claimants opposing the transfer of a registered office of a SCE, the Register of Cooperative Societies shall send the message to the District Court in the jurisdiction in which the Society has a registered office. In case no claimant has opposed the transfer, the Register of Cooperative Societies shall grant the Society the transfer license being applied for (Art. 15).

The same goes for procedures regarding opposition to mergers and scrutiny of merger procedure: "A decision by the Financial Supervision Authority as per Art. 6 concerning merging and Art. 11 concerning transfer may be submitted to a District Court within a month as of the time the Society obtained knowledge about the decision (Art. 28)."

Concerning provisions related to holding a general meeting of a SCE, Art. 18, Par. 2 states that: "In addition to duties in accordance with the provisions of the Regulation on European Cooperative Societies the supervisory management Board shall render to an Annual General meeting a report containing information on matters of importance concerning an assessment of the Society's annual accounts in a report from Auditors or Inspectors."

In case of winding up a SCE, Art 27 states that: "In case a European Cooperative Society does not meet its duties in accordance with Art. 12 of the Regulation on European Cooperative Societies to the effect that the Society's registered office and head office be in the selfsame State in the European Economic Area, a Member State of the European Free Trade Agreement or in the Faeroe Islands the Register of Cooperative Societies shall confirm this by means of a special decision. The Register shall thereupon give the Society instructions to amend the shortcoming within a suitable respite. The instructions shall

[80] This restriction does not concern Icelandic cooperatives as they are not allowed to operate financial lending services according to Act No. 22/1991 Respecting Cooperative Societies. Only mutuals ("sparisjodir") and private firms are allowed to operate financial lending services according to Icelandic law.

contain a warning to the effect that the administration of the Society will be required if it does not amend the shortcomings."

In case a European Cooperative Society does not comply with these instructions, the Minister of finance shall file a requirement to the effect that the Society will be taken for administration in accordance with Art. 62a of Act No. 22/1991 respecting Cooperative Societies.

Art. 62a of Act No. 22/1991 declares:

"A cooperative shall be winded up if:

1. Declaration that states that the cooperative shall be winded up is approved by two lawful society meetings of the cooperative in row and approved by 2/3 of its members that have voting rights. In a society with division, the motion shall be raised in a division meeting between the society meetings and shall be approved by simple majority of votes.

2. Society members become less than 15 or less than 3 in case of a cooperative alliance or if society is not operated according to the present Act. This is though not valid if the minister has approved exemption from the minimum number of members, cf. 5th paragraph of Art. 4.

3. The board of the society is obligated to declare the society bankrupt according to Act on bankruptcy.

4. The society neglects to inform the Register of Cooperative Societies of announcements that it is obligated to do according to the present Act.

5. The society shall be wounded up according to its statuses.

6. Revised annual accounts have not been received by the Registry of Annual Accounts for the last three years, cf. Act on Annual Accounts (Act 22/2001, Art. 7, and Act 45/2003, Art. 4)."

1.4 Essential bibliography

English translation of **Act 92/2006 respecting European Cooperative** Societies, the Ministry of Economic and Business Affairs:

http://eng.efnahagsraduneyti.is/laws-and-regulations/nr/2875

Lög um aðild starfsmanna að evrópskum samvinnufélögum nr. 44/2007 (Act 44/2007 respecting Participation of Employees in European Cooperative Societies), Althingi, Reykjavik 27th March 2007.

Lög um evrópsk samvinnufélög nr. 92/2006 (Act No. 92/2006 respecting European Cooperative Societies), Althingi, Reykjavik 14th June 2006. (English translation: http://eng.efnahagsraduneyti.is/laws-and-regulations/nr/2875).

Lög um samvinnufélög nr. 22/1991 (Act No. 22/1991 respecting Cooperative Societies), Althingi, Reykjavik 27th March 1991.

2 A comment on the implementation of the SCE Regulation in Icelandic legislation

The implementation of the SCE Regulation in the form of the Act No. 92/2006 respecting European Cooperative Societies appears to have been unnoticed by the general public in Iceland. There are no articles in newspapers that discuss Act 92/2006 nor Act 44/2007[81] and the same goes for professional discussion in the main judicial journal, **Ulfljotur**[82], in which there was no article published on the matter in its issues 2006-2009. Consequently, there was no national debate on implementation of SCE Reg. in Iceland.

According to the Registry of Cooperative Societies, there is no registered SCE in Iceland.

Consultation with leaders of Icelandic cooperatives based on the questionnaire of the present research indicates that they are unaware of the SCE Reg. and do not therefore have any expectations concerning benefits related to the implementation of the SCE Reg.

The national legislators and government have not provided any measures to facilitate the creation or promotion of SCEs in Iceland. There are no special courses on cooperatives or management of cooperatives in the entire educational system in Iceland, universities included. However, there is one course at the Reykjavik University that focuses partly on cooperatives, i.e. the course 'Non-Profit Enterprises and Institutions'.

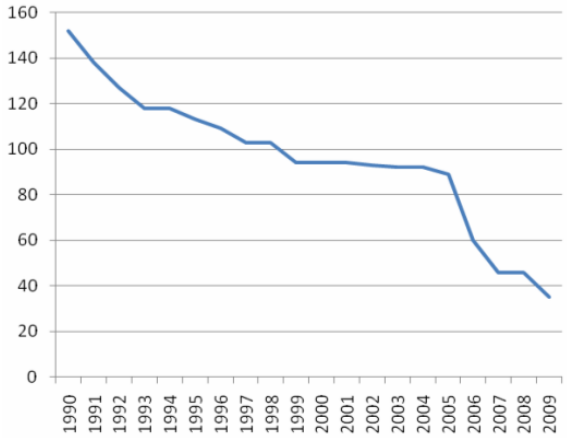
The main reasons for why Icelandic cooperatives have not adopted SCE legal forms for cross-border activities is that they are unaware of the SCE Regulation as the survey and answers to the questionnaire shows that was sent to the chairman of the Association of Icelandic Cooperatives (SIS) and directors of the main cooperatives in Iceland in relation to this report.[83]

Furthermore, the cooperatives in Iceland are still dealing with crisis and structural adjustment that started with the collapse of the central body of the cooperative movement in Iceland in the early 1990s, the Association of Icelandic Cooperatives (Samband islenskra samvinnufelaga, SIS). As the following figure indicates, the number of cooperatives in Iceland fell from 152 in 1990 to 35 in 2009[84]. Furthermore, only 22 of the

[81] See www.timarit.is that contains copies of all Icelandic newspapers and most journals.
[82] **Ulfljotur** is published by the Department of Law at the Uninversity of Iceland.
[83] Cooperatives that took part in the survey were: 1) Retailing cooperatives: Kaupfelag Sudurnesja/Samkaup, Kaupfelag Borgfirdinga, Kaupfelag Steingrimsfjardar, Kaupfelag Vestur-Hunvetninga, Solufelag Austur-Hunvetninga, Kaupfelag Heradsbua, Kaupfelag Faskrudsfjardar; 2) Retailing and production: Kaupfelag Skagfirdinga; 3) Production: Audhumla ; 4) Holding company: Kaupfelag KEA. 5) Housing cooperative: Buseti. None of these cooperatives are unions of cooperatives. The number of members of these coops was around 26232 in 2009. The rest of cooperatives that we have been able to get information on concerning number of members count for 8359 members. These last mentioned cooperatives are: SS; Kaupfelag Arnesinga; Bumenn and; Buseti a Nordurlandi. In terms of members the cooperatives that took part in the survey represent around 76% of all members of coops in Iceland.
[84] For a detailed analysis of the history and crisis of the Icelandic cooperative movment, see Ivar Jonsson (2006) **Samvinnuhreyfingar Bandarikjanna, Bretlands og Islands**, Haskolinn a Bifrost (The Cooperative Movments of USA, Britain, Sweden and Iceland)
(http://www.felagshyggja.net/Felagar/Samvinnnuhreyfingar.pdf)

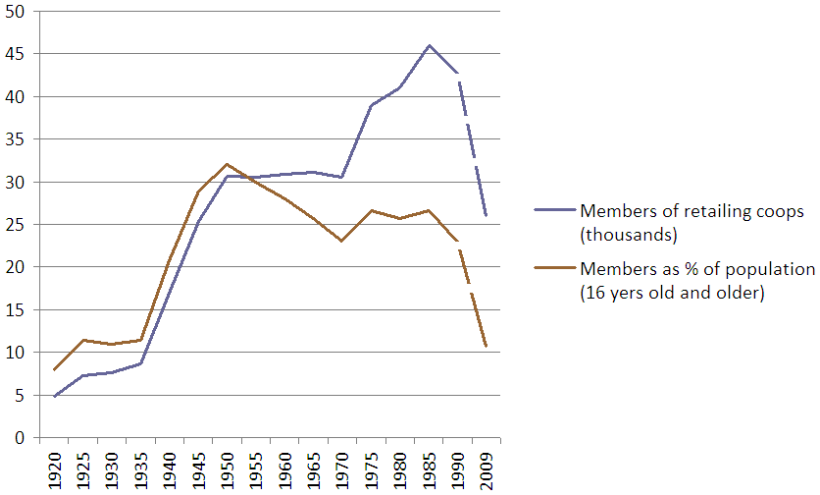
registered coops had a telephone number in the telephone registry in 2009. It appears that 22 cooperatives or fewer are actually in operation in Iceland. The main reason for the collapse of the Association of Icelandic Cooperatives (AIC) was growing indebtedness in the 1980s due to increasing real interests following indexation of bank loans by law. Furthermore, local cooperatives became increasingly indebted to AIC as their position weakened seriously in the last quarter of the 20th century due to demographic reasons and rapid concentration of the Icelandic population in the Reykjavik area.

Figure 1.
Number of Cooperatives in Iceland 1990-2009



Sources: Iceland Statistics and the Registry of Icelandic Cooperatives.

Figure 2.
Number of Members of Retailing Coops in Iceland 1920-1990 and 2009



Jonsson, Ivar (2006: 116) for figures related to 1920-1990. Figures for 2009 were provided by Association of Icelandic Cooperatives ("Samband islenskra samvinnufelaga") and interviewees of the survey carried out for this report.

The figure above shows the number of members of cooperatives in the retailing sector 1920-2009. The figure does not include the number of members of housing cooperatives. The number of members of housing coops has been gradually increasing since the 1970s. In 2009 there were 26.390 members of retailing cooperatives in Iceland, while the number of members of housing cooperatives was around 5.290.

Besides the above mentioned, there were 2.211 members of the coop South-Iceland Slaughterhouse in 2009 according to its Annual Report. Furthermore, the number of members of the dairy producer Audhumla was 700 according to its homepage.

Consequently, we may presume that the number of members of coops in Iceland were at least 34.591 in 2009.

Moreover, in the 1990s, Act on "private limited liability companies" was introduced that presumes that as few as one person can establish that kind of company. The minimum value of shares is only 500 thousand kronas (ca. 2700 Euros) and it is therefore very easy for persons to establish a company. This form of company is very popular and a competitor to the legal form of cooperatives. The minimum number of members of cooperatives is 15 according to Act No. 22/1991. It would make cooperatives more attractive if the minimum number of members would be reduced.

Finally, most cooperatives in Iceland are in the agricultural sector. There is a strong opposition against collaboration between Iceland and EU in this sector. This situation probably undermines interests in legislation that has its roots in EU regulations.

3 Overview of national cooperative law

3.1 Sources and legislation features

Cooperatives in Iceland are registered at the Register of Cooperative Societies operated by the Director of Internal Revenue.

They are regulated by, on the one side, general law, i.e. Act No. 22/1991 respecting Cooperative Societies. On the other side they are regulated by special Act on building cooperatives (Act No. 153/1998) and Act on housing cooperatives (Act No. 66/2003).

Building cooperatives and housing cooperatives are regulated by the general law on cooperatives, i.e. Act No. 22/1991. However, there are special provisions defined in the Act No. 153/1998 and Act No. 66/2003 that particularly refer to building and housing cooperatives respectively.

In the general law, Act No. 22/1991, the minimum number of members of cooperatives is prescribed as 15. However, the minister of economic affairs can allow exception from this minimum number (Art. 4, Par. 5). In the case of building cooperatives, the minimum number of members is 10 and in municipalities with 15000 or more inhabitants, the minimum number is 50 (Act No. 153/1998, Art. 2). Moreover, Art. 6 of Act No. 153/1998 states the statutes of building cooperatives must require that any member of a building cooperative shall be prohibited from selling the apartment that he or she has been allocated by the cooperative for five years following allocation. Furthermore, the cooperative has the prior option of purchase, but if it does not use its right the member can sell the apartment.

In the case of housing cooperatives, the Act No. 66/2003, Art. 1. provides their members the right to buy enduring accommodation, right to rent an apartment from the cooperative by paying accommodation right fees and accommodation rent. The statutes of the housing cooperative in question define the price of the accommodation right and conditions of repay (Art. 4).The holder of the accommodation right is not allowed to rent the apartment to a third party without the consent of the housing cooperative (Art. 19). A housing cooperative can't terminate its accommodation contracts with its members unless the member has seriously violated the contract according to law and the statutes of the cooperative (Art. 22).

Housing cooperatives are obliged to pay 1% of the cost of building apartments or their purchasing price in the cooperative's reserve fund (Art. 5).

3.2 Definition and aim of cooperatives

Act No. 22/1991, Art. 1, declares that the aim of cooperative societies "is to enhance the interests of their members according to their economic participation in their activity. The number of members in cooperative societies is limitless, the amount of capital is not defined, members and other participants are not personally responsible for the obligations of the cooperative society in question and the organization of the society is as prescribed in this Act."

3.3 Activity

Act No. 22/1991, Art. 2, declares that "The scope of the activities of a cooperative society can be as follows:

1. To provide and satisfy the needs of its members and others with goods and various services.
2. To produce and sell products that members produce in their own businesses.

3. To take care of activity that enhances the interests of its members."

Art. 2 of Act 22/1991 allows cooperatives to establish special section in the cooperative in question that receives deposits from members and customers and use as operational capital. The cooperative society's statutes regulate withdrawals from the deposit accounts. Art. 2 defines the financial conditions for establishing deposit sections in a cooperative. Minimum equity of the cooperative must be 100 million kronas[85] and equity must not be less than 15% of total assets when unregistered assets and liabilities against subsidiaries and affiliates have been subtracted from equity. Paragraph 3 of Art. 2 claims that deposit sections of cooperatives are not allowed to run lending activity. This is in accordance with Art. 13 of Act No. 161/2002 on Financial Undertakings: "A financial undertaking must operate as a limited-liability company."[86]

The area of financial undertaking is the only field of activity that cooperatives in Iceland are not allowed to enter. Financial undertakings are reserved to limited-liability companies and savings and loan associations (sparisjodir).

3.4 Forms and modes of setting up

Art. 4, Par. 1, of Act No. 22/1991 states that to establish a cooperative society people must advertise publicly a founding meeting in their region or field of activity in which the cooperative society is meant to occupy.

3.5 Membership

Art. 4, Par. 1, of Act No. 22/1991 states furthermore that besides individuals, societies or institutions can establish a cooperative society if that is announced in the respective public advertisement for the establishing meeting. Those who establish the cooperative society must not face procedures of bankruptcy and individuals in question must be of lawful age, i.e. at least 18 years old. The minimum number of parties that establish a cooperative society is 15. Art. 62 states that if the number of members becomes less than15 the cooperative shall be deregistered.

Art. 16 declares that new members recruited in cooperative societies must apply to the board of the society in question unless statutes prescribe in a different way. Act 22/1991 does not presume any other members of cooperative societies than user-members.

[85] Approximately 555 thousand Euros in terms of exchange rate at 7th of January 2010.
[86] Act No. 161/2002 on Financial Undertakings, http://eng.efnahagsraduneyti.is/laws-and-regulations//nr/2974.

3.6 Financial profiles

Act No. 22/1991 does not require any minimum capital for the establishment of a cooperative. The framework for financial operations of cooperatives is the "establishment fund" (stofnsjodur). The revenues of this fund are: a) membership fees; b) that part of profits that the general meeting decides once operating losses from previous years have been deduced and, c) other revenues according to law and statutes of the respective cooperative society (Art. 37).

According to Art. 54, cooperatives are required to pay 10% of annual profits, once operating losses from previous years have been deduced and payments to other funds consistent with law, to the cooperative's reserve fund until the reserve fund amounts to 10% of the value of the establishment fund or 10% of the sum of the value of Section-A and Section-B funds.

According to Art. 53, the statutes of a cooperative can prescribe that annual profits can be divided to its members in proportion to the scale of their business with the cooperative. Furthermore, producer cooperatives can prescribe that annual profits can be divided to its members in proportion to the scale of their work for the cooperative. Before profits can be allocated to members in this way operating losses from previous years must have been deduced and payments to other funds consistent with law, and to the cooperative's reserve fund.

Cooperative societies are allowed to divide their establishment fund into two sections, i.e. Section-A and Section B. Revenues that Section B obtains are income due to "cooperative shares" (samvinnuhlutabref) sold to non-members. The membership fees that members pay become shares in Section A of the establishment fund in case the establishment fund is split into Section-A and Section-B. Indexation and saving bank rents are annually added to the value shares in Section-A or the establishment fund if it is undivided into Section-A and Section-B. Only members can own shares in Section-A, but both members and non-members can own share in Section-B (Art. 37). Owners of shares in Section-B do not get voting rights in the respective cooperative according to Art. 42, but they have right to speech.

The general meeting of a cooperative decides upon payments of dividends according to Art. 41. In case of a cooperative with a Section-B fund, payments out of Section-A fund and Section-B fund shall be decided by general meeting and the cooperative's statutes. Owners of shares in Section-B fund that own 10% or more of shares, can demand that general meeting allocates to them in the form of dividend, up to half of annual profits given that operating losses from previous years have been deduced and payments to reserve fund have been deduced according to law and statutes of the cooperative. The total amount of dividends must not exceed 10% of the nominal value of shares in the Section-B fund (Art. 41, Par. 2).

3.7 Organizational profiles

Cooperatives in Iceland can be organized either as one undivided unit or they can be divided into divisions. Their organization is prescribed by Act 22/1991 and their statutes. In cooperatives that are not divided into divisions each member has one vote in society and general meetings unless statutes state differently. In cooperatives with divisions, each member of a division has one vote. The number of delegates that a division elects for society or general meeting is defined in the statutes of the cooperative (Art. 20). A cooperative society that provides services or produces products for other cooperatives may allow in its statutes that the number of members' votes reflect the scale of their business with the cooperative in the past year. The cooperative may also in its statute allow allocation of extra votes to some of its members (Art. 20, Par. 2).

The board of a cooperative is elected in its general meeting. At least three members must be elected on the board and three alternates. The statutes of a cooperative may allow employees, interest groups or the government to nominate part of the members of the board, but the majority of members of the board shall always be elected in the cooperative's general meeting. Members of the cooperative society are eligible for office. If a society or institution is a member of a cooperative then members of their board and managers are eligible. If the statutes of the cooperative do not declare otherwise, then the board decides it division of labour following the general meeting (Art. 27).

Art. 55 observes the role of supervisory bodies. It states that a member of a cooperative society can require in a general or society meeting that an investigation takes place into the establishment of the society, particular matters of its operations or particular aspects of its accounting and annual financial report. If the motion is accepted by at least 25% of the votes or division delegates, then the member can within a month require that the minister of economic affairs nominates investigators. Moreover, owners of at least 25% of shares in Section-B fund can require that the minister nominates such investigators. The minister decides if there is reason for such an investigation and the number of investigators. A written report of the investigators shall be accessible on the office of the cooperative society at least one week before society meeting.

3.8 Registration and control

Act No. 22/1991, declares in its first article that the minister of finance is responsible for registration of cooperative societies. Art. 10 states that the Register of Cooperative Societies is operated by the Director of Internal Revenue (Rikisskattstjori).

Icelandic cooperatives are not subject to public control or any other forms of external control in addition to the Acts on cooperatives mentioned above. Furthermore, they are not controlled by the representative organisations of the cooperative movement.

3.9 Transformation and conversion

Act No. 22/1991 monitor transformation of a cooperative society into a different legal form of enterprise. Art 61, Par. 1 claims that following a proposal from the board of a cooperative society, society meeting may change it into a limited-liability company. At least 2/3 of the votes in the meeting must accept the motion. The meeting must be announced two weeks in advance of the meeting date. The motion, plan for the transformation and attached material shall be accessible to members at the office of the cooperative at least one week before the meeting. Furthermore, Art. 61 states:

"When the board has accepted a motion of transformation it is not allowed to accept new members of the cooperative society and pay out of the establishment fund payments to members from the date of the motion until the limited-liability company has been registered or the motion rejected. Society meeting shall be held within one month from the date that the board makes its decision."

3.10 Specific tax treatment

According to the Tax Office of Reykjavik, cooperatives are not subject to a specific tax law treatment in Iceland.

3.11 Existing draft proposing new legislation

There is no proposal for new legislation at the Icelandic parliament, Althingi.

3.12 Essential bibliography

Jonsson, Ivar (2006) **Samvinnuhreyfingar Bandarikjanna, Bretlands, Svithjodar og Islands** (The Cooperative Movements of USA, Britain, Sweden and Iceland), University of Bifrost, Bifrost. (http://www.felagshyggja.net/Felagar/Samvinnnuhreyfingar.pdf).

Lög um fjármálafyrirtæki nr. 161/2002 (Act No. 161/2002 on Financial Undertakings, http://eng.efnahagsraduneyti.is/laws-and-regulations//nr/2974.

Lög um samvinnufélög nr. 22/1991 (Act No. 22/1991 respecting Cooperative Societies), Althingi, Reykjavik 27th March 1991.

Statistical Bureau of Iceland (1997), **Hagskinna**, Reykjavik: Statistical Bureau of Iceland.

4 The SCE Regulation and national law on cooperatives

The SCE Regulation has not had any impact on the national legislation on cooperatives as can be seen from the fact that there is no reference to the SCE Regulation or Act no. 92/2006 respecting European Cooperative Societies that implemented the SCE Regulation 1435/2003 in Iceland on 14th of June 2006, on Act 22/1991 up to present date.

The main legal obstacle that cooperatives in Iceland face is the provision in Act No. 161/2002 on Financial Undertakings that limits lending activity to saving banks and limited-liability companies as was discussed above. Improvements in this field are highly recommended, as lending activity by cooperatives would improve investment opportunities and financial independence of Icelandic cooperatives. Consequently, the competitiveness of cooperatives would increase vis-à-vis private corporations.

IRELAND

By Bridget Carroll

SUMMARY. Introduction. – **1.** The implementation of SCE Regulation 1435/2003 in Irish legislation. – **1.1.** Details of implementation. – **1.2.** Structure and main contents of the Regulation. – **1.3.** Articles imposing an obligation to implement. – **1.4.** Options in the Regulation. – **1.5.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.6.** Inventory of SCEs in Ireland. – **1.7.** Analysis of implementation in Ireland. – **2.** Overview of national cooperative law in Ireland. – **2.1.** Sources and legislation features. – **2.1.1.** Industrial & Provident Societies Acts 1893-2005. –. **2.1.2.** Credit Union Act 1997. – **2.2.** Activities cooperatives are allowed engage in. – **2.3.** Forms and modes of setting up. – **2.4.** Membership. – **2.5.** Financing. – **2.6.** Governance. – **2.7.** Registration and control. – **2.8.** Transformation and conversion. – **2.9.** Tax treatment. – **2.10.** Pending legislative and administrative reform. – **2.11.** The SCE Regulation and national law on cooperatives. – **2.11.1.** How the legal regime helps. – **2.11.2.** Legal barriers to cooperative development. –. **3.** Visibility of the Cooperative sector in Ireland. – **3.1.** Measures that support and promote cooperatives. – **3.1.1.** Education and Training. – **3.1.2.** Business Support services. – **3.1.3.** Other supports. – **3.2.** Examples of good practices among cooperatives in Ireland. – Conclusion. – Bibliography.

Introduction

This report describes the results of the research conducted on the implementation of the Regulation on the Statute for European Co-operative Societies (1435/2003) in Ireland. The report is based on desk and primary research carried out in consultation with the following organisations which were invited to participate in the study. These organisations make up the main representative organisations of the co-operative movement in Ireland as well as the relevant public bodies and other interested organisations. Interview schedules were distributed to key informants in advance of interviews which were conducted face-to-face or by telephone between January and April 2010. In addition, the author made use of a number of recent submissions made in response to a Consultation Paper on the Industrial and Provident Societies Acts as part of a review currently underway in Ireland of the legislation governing co-operatives.

1. The Co-operative Legislative Unit based in the government Department of Enterprise, Trade and Employment
2. The Office of the Registrar of Friendly Societies, Ireland
3. The Irish Co-operative Organisation Society (ICOS) – an umbrella organisation for co-operatives in Ireland
4. The Irish League of Credit Unions (ILCU) – the trade body with which the majority of Irish credit unions are affiliated to
5. The National Association of Building Cooperatives (NABCo) – the representative, promotional and development body for cooperative housing in Ireland

6. The Society for Co-operative Studies in Ireland (SCSI) – a co-op whose aim it is to promote education and research studies about co-operatives and co-op principles
7. Co-operative Support Services (CSS) – a development agency working with ethnic minorities in Ireland
8. The Centre for Co-operative Studies, University College Cork – a university research centre in the field of co-operative research and education.

1. The implementation of the SCE Regulation in Irish legislation

Statutory Instrument No. 443 of 2009, European Communities (European Cooperative Society) Regulations 2009 came into force in Ireland on the 29th October 2009.

1.1 Details of implementation

The SCE Regulation has been implemented in the Republic of Ireland by Statutory Instrument No. 443 of 2009, European Communities (European Cooperative Society) Regulations 2009 by the Minister for Enterprise, Trade and Employment, in exercise of the powers conferred by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving full effect to Council Regulation (EC) No. 1435/2003 of 22 July 2003[87] on the Statute for a European Cooperative Society (SCE) and Corrigendum to Council Regulation (EC) No. 1435/2003 on the Statute for a European Cooperative Society (SCE) of 18 August 2003[88]. Notice of the making of this Statutory Instrument was published in "Iris Oifigiúil" (official gazette) of 3 November 2009.

It is interpreted that the Industrial and Provident Societies Acts (the statutory system which regulates the formulation and general operation of co-operative societies in Ireland) and the SCE regulations are construed together as one and that the term "cooperative", for the purposes of these regulations, means a society registered in accordance with the Industrial & Provident Societies Act of 1893.

1.2 Structure and main contents of the Regulation

S.I. No. 433 of 2009 itself is concise but it is complex in terms of the need for cross-reference to national legislation.

The main contents of the Statutory Instrument are as follows:

1. General – citation, construction and interpretation

[87] OJ No. L207, 18.08.2003, p 01-24.
[88] OJ No. L049, 17.02.2007, p 35.

2. Formation, registration and transfer of an SCE
3. Discretionary powers given to member states by EC Regulation- provision made in exercise thereof
4. Provisions made in fulfilment of obligation to enact certain measures
5. Provisions relating to the effective application of the EC Regulation.

There are no significant stated rules and/or operational, territorial or other restrictions, obligations or obstacles related to the nature of business or to the free exercise of certain activities to be carried out by the SCE in the S.I. (cross-reference to national law). There is one relatively minor point outlined below in 1.4 - Article 2.2.

Measures enabling or facilitating the formation of SCEs, as required by article 78, paragraph 1, of the SCE Reg. are covered in Part 5 Provisions Relating to the Effective Application of the EC Regulation (Sections 28-34). These include;

- The application of law
- Competent authorities
- Records of an SCE transferred under Article 7(11) or a co-operative ceasing to exist under Article 33(1) and (2)
- Notification of insolvency events
- Registrar to prescribe forms
- Offences and
- Relationship of certain Regulations to EC Regulation.

The Regulation has been transposed as a matter of public administration. The Registrar and other public bodies do not see it as their function or possible within their budget to actively promote SCEs.

1.3 Articles imposing an obligation to implement:

The S.I. has aimed to meet all those obligations and exercises those options that the SCE Regulation respectively imposes on and grants Member States but this has not been tested.

1.4 Options in the Regulation

No	SCE REG. PROVISION	CONTENT OF THE OPTION	IS THE OPTION IMPLEMENTED?	NATIONAL IMPLEMENTING LAW PROVISION
1	Art. 2, par. 2	to permit that a legal body the head office of which is not in the Community participates in the formation of an SCE	YES	Part 2.6, S.I. 43/2009
2	Art. 6	to oblige the SCE to locate the head office and the registered office in the same place	NO	
3	Art. 7, par. 2	to provide additional form of publication for the transfer of the registered office	YES An SCE in respect of which there is a transfer proposal referred to in Article 7(2) shall notify in writing its members and every creditor (including the Revenue Commissioners) of whose claim and address it is aware of the proposal and of the right to examine the transfer proposal and the report drawn up under Article 7(3), at its registered office and on request, to obtain copies of those documents free of charge, not later than one month before the general meeting called to decide on the transfer. Every invoice, order for goods or business letter, which, at any time between the date on which the transfer proposal and report become available for inspection at the registered office of the SCE and the deletion of the SCE's registration on transfer, is issued by or on behalf of the SCE, shall contain a	Part 3.10, *ibidem*

			statement that the SCE is proposing to transfer its registered office to another Member State under Article 7 and identifying that Member State (but see also point 4 below)	
4	Art. 7, par. 7, subpar. 1	to provide requirements for the protection of the interests of creditors and holders of other rights in case of transfer	YES A statement of solvency with accounts of the SCE shall be delivered to the Registrar of Friendly Societies (but see also point 3 above)	Part 2.7 (2), *ibidem*
5	Art. 7, par. 7, subpar. 2	to extend the application of art. 7, par. 7, subpar. 1, to liabilities that arise, or may arise, prior to the transfer	YES	Part 3.11, *ibidem*
6	Art. 7, par. 14	to prohibit the transfer of the registered office in case of opposition by competent authorities	YES	Part 3.12 (1), *ibidem*
7	Art. 11, par. 4, subpar. 2	to entitle the management organ or the administrative organ of the SCE to amend the statutes without any further decision from the general meeting in the case described by art. 11, par. 4, subpar. 1	YES	Part 3.13, *ibidem*
8	Art. 12, par. 2	to derogate from the national provisions implementing Directive 89/666/EEC in order to take account of the specific features of cooperative	No	Part. 3.14 (1) (b), *ibidem*
9	Art. 21	to prohibit a cooperative to take part in the formation of an SCE by merger in case of opposition by competent authorities	YES	Part 3.15, *ibidem*
10	Art. 28, par. 2	to ensure appropriate protection for members who have opposed the merger	NO	
11	Art. 35, par. 7	to condition conversion on a favourable vote of a qualified majority or unanimity in the controlling organ of the cooperative	YES The draft terms of conversion and the statutes of the cooperative shall be	Part 4.24 (5), *ibidem*

		within which employee participation is organised	approved by a majority of not less than two-thirds of the votes validly cast at a general meeting of the SCE at which the members present or represented make up at least half of the total number of members on the date the general meeting is convened	
12	Art. 37, par. 1	to provide for the responsibility of the managing director	NO	
13	Art. 37, par. 2, subpar. 2	to require or permit an SCE statutes to provide for the appointment and removal of the members of the management organ by the general meeting	YES permitted	Part 3.16, *ibidem*
14	Art. 37, par. 3	to impose a time limit on the period indicated therein	NO	
15	Art. 37, par. 4	to fix a minimum and/or maximum number of members of the management organ	YES min. 2	Part. 3.17, *ibidem*
16	Art. 37, par. 5	to adopt appropriate measures for the two-tier system	NO	
17	Art. 39, par. 4	to stipulate the number of members or a minimum and/or a maximum number or the composition of the supervisory organ	NO	
18	Art. 40, par. 3	to entitle each member of the supervisory organ to require the management organ to provide information	YES	Part 3.18, *ibidem*
19	Art. 42, par. 1	to provide for the responsibility of the managing director	NO	
20	Art. 42, par. 2	to set a minimum and, where necessary, a maximum number of members of the administrative organ	YES min 2	Part 3.19, *ibidem*
21	Art. 42, par. 4	to adopt appropriate measures for the one-tier system	NO	
22	Art. 47, par.	to limit the power of	NO	

	2, subpar. 2	representation in the event described therein		
23	Art. 47, par. 4	to provide for the enlargement of statutes capacity to regulate the power of representation	NO	
24	Art. 48, par. 3	to dictate particular provisions on operations requiring authorisations	NO	
25	Art. 50, par. 3	to dictate particular provisions on the supervisory organ's quorum and decision-making	NO	
26	Art. 54, par. 1	to provide about the date of the first general meeting after incorporation	YES	Part 3.20, *ibidem*
27	Art. 61, par. 3, subpar. 2	to set the minimum level of special quorum requirements indicated therein	NO	
28	Art. 68, par. 1	to derogate from the national provisions implementing Directives 78/660/EEC and 83/349/EEC in order to take account of the specific features of cooperative	NO	
29	Art. 77, par. 1	to permit the expression of capital in Euro (where the third phase of EMU does not apply)	Not applicable	
30	Art. 77, par. 2	to permit that accounts are prepared and published in the national currency (where the third phase of EMU does not apply)	Not applicable	

Other relevant provisions:
For the purposes of Article 75, the statutes of an SCE may provide for the distribution of its net assets as set out in its statutes otherwise than in accordance with the principle of disinterested distribution (part 3.21, *ibidem*)

1.5 The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The competent authorities designated under Article 78, paragraph 2, SCE Reg. are:
(*a*) in respect of Articles 7, 21, 54 and making an application under Article 73(1), **the Registrar of Friendly Societies,** and
(*b*) in respect of Articles 29, 30 and making an order under Article 73(1), **the High Court.**

1.6 Inventory of SCEs in Ireland

This research has established that there are no SCEs in Ireland at the time of writing and that none have been set–up or wound down to date. This has been verified by the national office of the Registrar of Friendly Societies, the public body responsible for SCE registration. There is no other means of registering an SCE in Ireland. Neither the author nor the key witnesses were aware of any national co-operative being a member of an SCE set up and registered in another country (or thinking of doing so in the near future).

1.7 Analysis of implementation in Ireland

The following is a summary analysis of the feedback received from key witnesses for this section of the project:

All respondents were familiar with the SCE regulation and what its purpose was. None of the respondents knew of any SCE registered in Ireland or of a national co-operative which is member of an SCE registered abroad or that were about to embark on either of these options. In terms of awareness of the regulation, respondents felt that the representative bodies of co-operatives in Ireland as well as the government departments with responsibility for SCEs were aware of the regulation but that generally speaking co-operative members did not have a high level of awareness of the regulation. This was due to the perceived lack of need for the structure.

Respondents thought that the lack of SCEs in Ireland was a result of the lack of perceived need to date for such a structure rather than as a result of any difficulties or shortcomings with the legislation itself. Many co-operatives in Ireland are not engaged in transnational activities. Those that are may already have structures (such as the hybrid structures used by the agriculture co-ops in Ireland) such that they had other mechanisms for dealing with such activities which were already in use. In addition it was felt that there did not seem to be significant if any financial or administrative advantages to using the structure. It was also suggested that co-ops might wish to “wait and see” how the structure worked for others before making use of it themselves. It was considered premature to suggest that the regulation had failed.

The costs of setting up and the minimum capital requirements for an SCE were not seen as particularly dissuasive factors although the capital requirement is high for a small co-op. The worker participation regime might be an issue if co-ops were aware of it but generally speaking the regulation is not “on the radar” for most co-ops.

Most respondents felt that the regulation was not overly complex, that it contained what it needed to contain and that those likely to be making use of it would already be familiar with such legislation. The public body responsible for the transposition of the regulation did think that it was complex in terms of cross-reference to national legislation.

As such there was no comment on whether the expectations behind the Regulation were being met. National legislators have “taken the SCE Regulation seriously” insofar as they have transposed the regulation but they do not see themselves as having a role (or at least a budget) for “providing effective measures for the creation and promotion of SCEs”. As of February 2010 the prescribed forms necessary to register an SCE were unavailable (they were going through the process of drafting and approval). This is indicative of the slow nature of transposing the legislation but given that there have been no requests to establish an SCE in Ireland it hardly seems an obstacle to their formation.

2. Overview of national cooperative law in Ireland

2.1 Sources, definition and legislation features

2.1.1 Industrial and Provident Societies Acts 1893-2005

There is no specific cooperative law in Ireland. The Industrial and Provident Societies Acts 1893-2005 is the legislative system which regulates the formulation and general operation of cooperatives other than credit unions in Ireland. The 1893 Act, although amended over the years, remains the principal legislation in this area. This act was “inherited” from the time of British rule in Ireland and was developed to provide for Victorian self-help societies (Quinn, 1994). Within the Industrial and Provident Societies Acts there is no definition of co-operatives. Section 4 of the 1893 Act provides for a society to be registered for *carrying on any industry, business or trade in or authorised by its rules*, *whether wholesale or retail, and including dealings of any description with land.* Section 4 of the 1978 Amendment Act does define an agricultural co-op society (by virtue of occupation of member and activity) as a *“society the business of which is wholly or substantially agriculture and the majority of the members of which are mainly engaged in farming”* with a similar definition for fishing co-ops in the same amendment.

The Acts do not provide any recognition of the distinct characteristics of co-operatives or any reference to co-operative principles. Nor is there a requirement, as is the case in the United Kingdom that a co-op must show that it is for the benefit of the community or a

bona fide co-op. However, representative bodies for cooperatives provide model rules which reflect *bona fide* co-op principles. Registration under the Industrial and Provident Societies Acts in Ireland renders a society a body corporate with limited liability. The word "limited" must be the last word in the name of every society registered under the act. There is no requirement to use the word "co-operative". Neither is there a prohibition on the use of the word "co-operative" by groups which are incorporated but not registered as societies.

Industrial and Provident Societies are divided into various classes (utilities, production, diary and so on) but this is a matter of administrative expedience and is not dealt with by law apart from the above definitions in the 1978 Amendment.

The regulation of co-operatives requires cross-reference to the Companies Acts 1963-2006. The following laws and amendments have been sent to the research team. All are in the English language.

- the Industrial and Provident Societies 1893 Act
- the Industrial and Provident Societies 1978 Amendment Act
- the Credit Union Act of 1997 and two associated amendments
- The European Co-operative Society Regulation – Statutory Instrument No. 433 of 2009.

2.1.2 Credit Union Act 1997 (as amended)

There is a legal distinction between credit unions and other types of co-operatives in Ireland. Credit unions are regulated under the Credit Union Act 1997, as amended (repealing an earlier Credit Union Act 1966) and as such have their own special law. The term "credit union" is protected or reserved under this legislation. Credit unions are required to use the term "credit union limited" in their title but, all other organisations are prohibited from using the term.

By virtue of its registration, a credit union is a body corporate known by its registered name (by which it may sue and be sued) with perpetual succession, a common seal and limited liability.

Under Section 6.2 a credit union is defined as a society registered for:

a) the promotion of thrift among its members by the accumulation of their savings;

b) the creation of sources of credit for the mutual benefit of its members at a fair and reasonable rate of interest;

c) the use and control of members' savings for their mutual benefit;

d) the training and education of its members in the wise use of money;

e) the education of its members in their economic, social and cultural well-being as members of the community;

f) the improvement of the well-being and spirit of the members' community; and

g) subject to *section 48*, the provision to its members of such additional services as are for their mutual benefit.

2.2 Activities cooperatives are allowed engage in

The definition in the Industrial and Provident Societies Acts would appear to allow for a broad range of activities but clearly could confine co-operatives to economic activity (industry, business or trade). However, co-op representatives do not report the definition as provided in the Acts as having restricted the scope of activities of co-ops to any major extent but rather that there has been a significant degree of freedom granted to societies in this regard. This has been facilitated by the Registrar broadly interpreting the terms of the Acts in respect of activities allowed. However, the definition is narrower than that of companies which may be formed for "any lawful purpose" (Companies Act 1963, s.5). It is questionable then whether there should be any definition and thus restriction in terms of the services that co-ops provide. ICOS, a key representative organisation for co-ops would prefer if co-ops carrying out an activity, "which is lawful", should be allowed to register without the need to have that activity "specified in or authorised by its rules". At any rate, currently the aims of societies must be included in their rules. With regard to public procurement rules seem to be the same as for a company under EU directive.

Banking activity is specifically prohibited in Section 19 of the I&PS Acts. The taking of deposits over a certain amount (currently €31,743.45) is specifically prohibited under Section 19 also (see 2.5 Financing below on restrictions on the raising of funds) but agriculture and fishing co-ops are exempt from this under the 1978 Amendment Act.

The law is silent on co-operatives dealing with non-members.

The Credit Union Act grants the Registrar of Credit Unions considerable powers over the activities that credit unions engage in and the services that they offer to members. For example, Part III, 26: (4) grants the Registrar of Credit Unions the power to "restrain a credit union from doing any act or thing which it has no power to do". Credit unions must secure approval from the Registrar before offering new services. Current rules confine credit unions to dealing with savings and loans and other minor financial services but disallow credit unions from getting involved in, for example, providing mortgages to members or extending the duration of loans to members (there has been some change in this recently). Credit union commentators are critical of these restrictions.

In terms of rules governing jurisdiction of the activities of co-operatives in Ireland, it is not stipulated that societies must have their registered office in the state. Societies registered under I&PS can conduct activities anywhere.

2.3 Forms and modes of setting up

In order to register an Industrial and Provident Society, the grouping involved must consist of at least seven people and must draw up a set of rules governing the operation of the society. The rules must as a minimum contain the matters required to be provided for by the Second Schedule of the Industrial and Provident Societies Act 1893 as follows:

- object, name, registered office;
- terms of admission of members;
- mode of holding meetings, scale and right of voting;
- making, altering or rescinding rules;
- determination of amount of interest;
- rules for transfer of shares;
- provision for audit of accounts;
- withdrawal of members;
- application of profits;
- custody and use of seal of the society and
- manner of capital investment.

However, it is not specified how these are to be treated. The rules, together with the prescribed application form and fee, are submitted to the Registrar of Friendly Societies for examination and, once the rules are found to be in accordance with statute, the society is registered. There are a number of representative groups for co-operatives with whom the Registrar has agreed forms of Model Rules which can be used in the registration of societies. There is no time period in which the Registrar has to permit or refuse registration. The current cost of registering is higher than that for companies.

Co-ops in Ireland may also incorporate as a conventional company limited by share or guarantee or as a partnership and thus fall under Companies Law. Cooperatives incorporated in such a way may build in co-operative principles in their memorandum and articles of association (i.e. their rules).

The establishment of new credit unions in Ireland is not forbidden by law but is not encouraged. Irish credit unions have the highest membership density among credit unions worldwide and there are over 400 in the country. The sector now considers the movement to have reached saturation point and thus considers it unwise for new credit unions to be established. This appears to be the view of the Registrar also. It is more likely that credit unions will transfer their activities to other credit unions. While membership of credit unions in Ireland is very accessible to the general population in terms of geographical location of credit unions (they are to be found in most towns in the country with sub-offices located in villages or other areas of smaller populations), there may be a question as to whether credit unions are reaching the very poor or socially excluded in terms of facilitating their access to financial services.

2.4 Membership

The minimum number of members allowed under the Industrial & Provident Societies Act is seven. There is an age restriction on members of societies – Section 32 stipulates that persons over the age of sixteen but less than twenty-one may be a member if the rules allow but cannot be a member of the committee, a trustee, manager or treasurer of a society.

The rules of societies must include:

- the terms of admission of new members,
- the determination of the amount of interest in the shares of the society that any member, other than a registered society, may hold and
- the terms of withdrawal by members from the society.

There is no legislative restriction on the admission of new members.

Credit unions are allowed to provide financial services to members only. There is a requirement for a minimum of fifteen members. Admission to the membership of a credit union is restricted to persons in at least one of the "common bonds" specified in Section 6.3 as:

(*a*) following a particular occupation;

(*b*) residing or being employed in a particular locality;

(*c*) being employed by a particular employer or having retired from employment with a particular employer;

(*d*) being a member of a *bona fide* organisation or being otherwise associated with other members of the society for a purpose other than that of forming a society to be registered as a credit union;

(*e*) any other common bond approved by the (Regulator).

Members of a credit union may be less than sixteen years of age but such members cannot vote in an Annual General Meeting.

2.5 Financing

There is no such concept as authorised share capital for Irish co-ops – the total amount of capital is at the discretion of the society. There is no minimum capital requirement for the establishment of a co-operative in Ireland. There is a statutory financial limit on individual shareholding (other than a member which is itself a society) that can be held in Irish co-ops – €150,000 or 1% of the total assets of the society, whichever is the largest (1893, s.4 and 2005 s. 85 & 86). This has only been in force since 2005 before which individual shareholding was held at a much lower rate. This applies to all classes/categories of society. This restriction is not seen as necessary or beneficial to co-ops although it is thought to satisfy the needs of the majority of co-ops at this time.

Since 1978 shares societies are not allowed to issue withdrawable shares (s.32) This is not deemed to have been a hindrance to co-ops and has proved to be helpful in relation to the International Accounting Standards 32 issue (as shares in Irish co-ops are non-withdrawable and therefore not classified as a liability, thereby avoiding this issue).

A cooperative may issue shares which are transferable by the consent of the board/committee (1893, s.10 and second schedule). This is seen by ICOS as giving the board/committee the option of restricting the transfer of shares to those likely to use the services of the co-op and therefore supporting the co-op principle of economic member participation.

Schedule 2, 6 stipulates that the rules of societies must include:

- the determination whether the society may contract loans or receive money on deposit subject to restrictions in the Act,
- whether shares may be transferable,
- the mode of application of profits and how capital may be invested.

Compulsory reserves are not provided for in law for societies but are in place for credit unions.

There is a restriction on societies raising funds which appears in the 1978 Act aimed at stopping the taking of deposits during a five year period and from October 1978. The holding of deposits of more than €31,743.45 is also curtailed. Fisheries and agricultural co-ops were exempt from this restriction and were to be able to raise funds without a financial limit. Co-ops other than agriculture and fishing co-ops can raise funds by subscriptions not exceeding €12,7000 in any six-month or the borrowing of money from a bank are required to apply to the Registrar for permission to raise such funds.

Societies are not allowed to issue debentures secured on personal property (floating charges). This arises from the Bill of Sales Act 1883 which exempts companies issuing debentures from its provisions but not societies. Credit unions are exempt from this provision under the 1997 Credit Union Act. Limitations to financial instruments that societies may use for investment also include guaranteeing the borrowings of subsidiaries which is unclear in law according to some commentators.

Agriculture co-ops also have a facility for registering charges that other types of co-operatives do not have. This is provided for under the 1934 Agriculture Co-operative Societies (Debentures Act). This facilitates lending secured on debentures for agriculture and fishing co-ops.

There is no provision in the legislation that ensures that societies have access to examinership.

Dissolution of societies is by order of three quarters of the members (Section 58) and by their signature to an instrument of dissolution or by order of the Registrar. Creditors are paid off and remaining assets are distributed according to the instrument of dissolution. It is not stated in law whether assets are distributed to members or to another co-op entity/for the benefit of the community.

A cooperative is obliged to provide public financial statements which are deposited to the Office of the Registrar of Friendly Societies. A full annual audit is required of every society regardless of size. The current annual return forms required by the Registrar are considered archaic and burdensome in that they entail duplication of information already provided in the annual accounts. The deadline for annual returns is March 31st yet the accounting year-end for most societies is December 31st.

There is no minimum capital requirement for the establishment of a **credit union**, they are given time to "build up" (but in practice the majority of credit unions in Ireland are well established and new credit unions are not being established).

Since September 2009 there is a compulsory reserve requirement before any surplus allocation. Credit unions can distribute as much surplus, by way of a dividend or an interest rebate to borrowers, as they wish once debts are paid and reserve requirements are followed (Section 45, 5).

Credit unions can issue financial instruments by way of credit agreements. They may also issue debentures but generally don't. They may issue bonus shares in lieu of dividend but again don't in practice.

In terms of public financial statements credit unions must furnish reports to the Registrar annually and tri-annually and they must return quarterly Prudential Return forms to the same office. The forms by which returns are made to the Registrar are to the satisfaction of the movement generally and they do not seem to have any issue with deadlines that must be met. They must provide a set of audited annual accounts to each member. They must also publicly display audited accounts.

2.6 Governance

In Kerry Co-op v Bord Bainne & Registrar of Friendly Societies, Costello J. concluded that *"society members were virtually free to manage their own affairs (subject to the rules and wider law)"* (Quinn, 1994). The rules of societies must include:

- the mode of holding meetings,
- the scale and right of voting,
- of making, altering or rescinding rules and
- of appointment and removal of the committee of management, of managers and other officers and their respective powers.

The law is silent on whether non-member managers are allowed. The committee may decide if shareholding and membership can be transferred to the beneficiary of a will in the event of the death of a member. There is a statutory limit of €15,000 for nominations (but under Sect. 85 f the Investment Funds, Companies and Miscellaneous Provisions Act 2005 rather than I&PS Acts). By and large societies are allowed under the IPS Acts to regulate their own affairs through their rules.

Governance of credit unions is stipulated in the 1997 Act. The Act is very prescriptive in terms of what credit unions may engage in, how credit unions are run and generally covers almost every aspect of credit union operations. The Registrar has ultimate say in registration as well as activities. Credit unions have a detailed Standard Rule Book but the 1997 Act takes precedence.

Staff can be a member of credit union boards but cannot be paid as such. In practice many credit unions do not allow staff on boards. There is nothing in the legislation on non-member managers.

2.7 Registration and control

See Section 2.3.

Apart from public control, co-operatives are not bound by other forms of control although they may and do sign up to certain rules or guidelines of their representative bodies. The Registrar of Friendly Societies may cancel the registration of a society with two months notice (Section 9) for ceasing to exist or function, at the request of the society or for violation of any provisions of the Acts. A society may appeal the cancelation (9.4). The Registrar has the power of inspection but this is relatively restricted and rarely applied.

The Registry of Credit Unions (RCU) is responsible for the registration, regulation and supervision of credit unions. In recognition of the unique nature of credit unions, a statutory position of Registrar of Credit Unions was explicitly created within the office of Financial Regulator to assume responsibility for the regulation of credit unions.

Appointed by the Irish Financial Services Regulatory Authority (now the Financial Regulator) and approved by the Minister for Finance, the Registrar reports directly to the Chief Executive of the Financial Regulator and in turn to the Regulator.

Under the Credit Union Act 1997 (as amended) the functions of the Registrar of Credit Unions are to regulate credit unions with a view to the:

- Protection by each credit union of the funds of its members; and the
- Maintenance of the financial stability and
- Well being of credit unions generally.

The Registrar of Credit Union's aim is to promote a financially stable credit union sector that operates in a transparent and fair manner and safeguards its members' funds. RCU uses a combination of off-site analysis and on-site inspections in carrying out the regulatory process. In theory the Registrar can revoke the charter/registration of a credit union but in practice this has not occurred.

There are multiple forms of control of credit unions in Ireland. Externally, this occurs through the Registrar of Credit Unions as well as field-officers from ECCU, the insurance body of the Irish League of Credit Unions (if the credit union in question is affiliated to that body) and internally through the Supervisory Committee, the board and the members at

AGM. It is important to note that every credit union in Ireland is independent of each other. They may or may not be affiliated to a trade body of which there are two – the Irish League of Credit Unions and the Credit Union Development Association. The protection of members' money is the stated aim of all forms of control of credit unions.

2.8 Transformation and conversion

Societies may transform to another corporate form as long as they comply with the procedures for doing so as set out in their rules - the passing of a special resolution by members (Sections 51, 54), of a majority not less than three quarters of the members or by proxy where proxies are allowed by the rules. Should a society opt to unwind, it must pay off creditors and may then distribute proceeds from assets among members as per stated rules. Section 53, 1 allows for any two or more societies by special resolution of both or all societies become amalgamated with or without the dissolution of funds and they may also transfer engagements to another registered society (53,2). A company may also convert to a society by a special resolution (55,1).

In order for credit unions to cease or convert form they need approval from the Registrar and the members. The process of approval of the Registrar is said to be a very slow process which needs to be improved. In practice conversion is not common. There have been a small number of examples of transfer of engagements through the sale of the loan book of the credit union that is winding down and the transfer of the members to the credit union that purchases the loan book.

2.9 Tax treatment

There is no specific tax treatment for co-operative societies. (Should a co-operative which is a non-profit apply and be recognised as a Charity then some benefits may accrue but this is a matter for the Revenue Commissioners rather than the I&PS Acts/Registrar). Credit unions are exempt from tax as they are not-for-profit organisations although the savings of individual members is subject to tax if exceeding a certain amount. This is clearly a favourable situation for credit unions.

2.10 Pending legislative and administrative reform

A programme of regulatory review and reform of the Industrial & Provident Societies Acts has been underway for some time. This review is in the context of the 2004 Government White Paper "*Regulating Better*" aimed at improving the quality of regulation

generally for businesses in Ireland in an attempt to reduce administrative burdens. A consultation paper on the Acts and administrative arrangements was issued in April 2009 by the Department of Enterprise, Trade and Employment (now Enterprise and Innovation). The Consultation documentation and commentary point to the desire to, on the one hand align co-op law more closely to Company Law with a view to removing obstacles but also to ensure that co-ops are regulated fairly. The approach that the review is taking is to deal with "specific problems or difficulties" rather than undergoing a larger scale review. It is intended that a new bill amending the Acts be published this year. The Consultation Paper may be seen to indicate what changes are likely to occur in any emerging bill (which may be published before the end of this project). The paper specifically sought submissions on the following and more detail is available on them in the Consultation Paper http://www.entemp.ie/commerce/cooplaw/:

-The activities for which societies can be registered
-Restrictions on share capital
-The transferability and withdrawability of shares
-The restrictions on raising of funds
-Extension of the exemption from the Bills of Sale Acts to all classes of society
-Improvements to the nature of financial reporting obligations
-Corporate governance requirements
-Transmission of members' property
-Other matters including membership, cancellation, disputes, amalgamation, winding up, enforcement and fees
- Public enforcement.

The Department of Finance has also very recently commissioned a review of the Credit Union Act and sector. The credit union movement is looking for several changes to existing legislation. There is no further information available on this at this time.

2.11 The SCE Regulation and national law on cooperatives

There have been no amendments to national law as a result of the Regulation but it was seen as one of the sources of interpretation for the Consultation Paper and is an additional stimulus for legislators in Ireland. It is the view of the office of the Registrar that the laws would be "complimentary" and "work in tandem" with each other. However, the existence in the Regulation of mention of the co-operative principles and the distict characteristics of co-operatives have been commented on by co-operators in Ireland. As one respondent put it "the new SCE regulation shows up our national legislation".

2.11.1 How the legal regime helps

As already mentioned, there is no specific “co-operative” law in Ireland. The Industrial and Provident Societies Acts have largely facilitated co-operative societies in fulfilling their objectives. They have allowed for legal incorporation with limited liability and registration. The regulatory regime has been relatively liberal or “light-touch” to date allowing co-ops a good deal of freedom in adopting their own rules. It has also been open to consultation with co-operative representatives, which has been very welcome. Proponents of minimalist legislation would be happy with it.

On the other hand, the credit union movement would generally recognise that the distinct legislation for that sector is very important and indeed it was heavily lobbied for. It recognises the inherent difference between credit unions and other form of companies. This legislation also serves to safeguard the assets of credit union members. Protection of the credit union name and a clear definition of what a credit union is under the legislation have been deemed essential by credit union advocates in ensuring that the credit union reputation is maintained and strengthened. Credit union legislation, however, is much more prescriptive than the I&PS and the regulatory regime much stricter (partly as a result of being in the financial services sector).

2.11.2 Legal barriers to cooperative development

The I&PS legislation has a number of drawbacks many of which will have become obvious earlier in this section. The legislation has been described as “dilapidated”. The Acts impose a statutory limit on individual shareholding, are narrower in terms of the definition of activities allowed in comparison with companies, there are restrictions on the raising of funds by societies, financial reporting arrangements under the Acts have been described as “archaic” by one key witness citing a need for it to be simpler and clearer, costs of registration and rule changes need to be the same as for companies and there is a need to provide for examinership. These are important issues with regard to the notion of a “level playing pitch” with other types of organisational regulation. As outlined earlier, a review of the Acts is currently underway which may see a Bill being introduced to remedy these problems. However, there have been several attempts to update the legislation over the years which did not materialise.

Several respondents feel that the continued growth and development of the co-operative model in Ireland may require more than just addressing the issues above but also explicit recognition in legislation. This may be achieved by defining co-operatives within the existing or new acts and/or by giving recognition to the distinct characteristics of co-operatives in Irish law. Such a law should also be without reference to other acts such as the Companies Acts for any aspect of formation, registration or governance or

administration. At the very least, a change to the title of the existing acts (the Industrial & Provident Societies Acts) making use of terminology that is relevant, clear and recognisable to the public, namely use of the term *co-operative,* would be a positive step. There should also be provision for restriction of the term *co-operative* in legislation. However, the flexibility available heretofore to societies in deciding on their activities should be retained and too inflexible a definition of co-ops is not desirable. Again, credit unions have benefitted from the existence of specific legislation recognising the unique structures and processes that prevail within their organisations and which distinguish them from more conventional financial institutions. A counterargument to the need for special legislation is, however, provided by Carey (2009) who wonders if co-ops as grassroots, bottom-up organisations need special recognition in legislation. One co-operator also felt that setting up co-ops under company law was perfectly adequate.

Given that the current Acts are subject to the interpretation of the Registrar of Friendly Societies, the development of co-operatives is dependent on this person and his/her staff having sufficient knowledge, understanding and recognition of the distinct nature and relevance of mutual forms of organisation. Unpublished research by the Centre for Co-operative Studies indicates that staffs, across a range of publicly funded bodies, are not very conversant in co-operatives. Legislation and terminology that distinguish the co-operative model may be a factor in helping to legitimize the model thus supporting its continued development.

Any changes to the existing legislation should aim to reflect the needs of existing societies but also to protect those of smaller/emerging co-operative sectors which may not currently have the critical mass or networks to lobby for change.

Barriers in credit union legislation have also been identified. While some commentators in the sector are happy that the Registrar has power through the Act to prevent credit unions from overreaching, the broad power of the Registrar of Credit Unions in terms of restricting activities of credit unions is criticised and credit union regulation in recent years is much more prescriptive and stricter. It is felt that very heavy lobbying by banks impacts on credit union freedom. An example is the inability of credit unions to get bank clearance within Ireland which results in using a French bank. The cost of electronic payments within Ireland is also very high – this is considered a competition issue. The credit union movement fears that the increased burden of compliance makes it difficult to attract volunteers who fear the responsibilities or liabilities that they may be facing. One respondent felt that credit unions are underrepresented at European level, although there is now a full-time lobbyist representing credit unions based in Brussels. It is felt important to have this representation due to the differences between credit unions and cooperative banks.

In conclusion, the I&PS Acts have facilitated Irish co-ops but Ireland is still in need of a suitable modern legislative and regulatory environment for co-operatives. In summary, any changes to legislation should:

- Acknowledge the distinct nature of cooperatives and use the term *co-operative*
- Ensure a level playing pitch between co-operatives and other incorporated entities both in terms of the regulation of their activities and in the incentives for choice of and support in adopting legal form
- Be accompanied by a comprehensive and efficient service of data retention
- Be supported by a commitment to fostering and maintaining knowledge and understanding of the nature of co-operatives amongst relevant officials.

3. Visibility of the Cooperative Sector in Ireland

3.1 Measures that support and promote cooperatives

Measures that support and promote co-ops are largely confined to academia and the representative bodies in Ireland.

3.1.1 Education and training

Education and training on and for co-operatives in Ireland at third level is largely confined to that researched, developed and delivered by the Centre for Co-operative Studies in University College Cork. The Centre for Co-operative Studies is a university research centre, founded in 1980, that promotes education and training along with independent research and consultancy in all aspects of co-operative organisation and development. Its programmes include a range of full and part-time blended learning programmes aimed at adult practitioners and include programmes which are aimed exclusively at co-operative organisation/business as well as those which have components of co-operative business. These programmes allow for adult access to third level and allow students to progress from diploma to degree to masters level and beyond. They include the:

- Diploma in Credit Union Studies
- Diploma in Social Integration & Enterprise for Community Development Workers (includes co-operative management)
- Diploma in Rural Development (includes co-operative management)
- BSc in Mutual & Credit Union Business
- BSc in Rural Development
- MBS Co-operative & Social Enterprise (on-line)
- Postgraduate Diploma in Co-operative Organisation, Food Marketing & Rural Development
- Diploma in Corporate Governance (for agriculture co-op directors/members)

Some of these programmes have been developed in conjunction with representative bodies for cooperatives including the Irish League of Credit Unions (ILCU) and the Irish Cooperative Organisation Society (ICOS). Modules on co-operatives are also taught in other programmes in University College Cork including the MBA, the Bachelor of Commerce, the BSc in Food Marketing & Entrepreneurship and the BSc in International Development & Food Policy.

The Centre for Co-operative Studies is the only academic centre for co-operatives in Ireland and there are very few other courses in Irish universities that focus on co-operatives – some agriculture/food courses may cover the role or performance of agriculture co-ops. University College Dublin has recently introduced some training for credit unions as has the University of Ulster (based in Northern Ireland but delivering courses in the Republic). The author is unaware of any further significant inclusion of material on co-operatives in third level curricula.

There is little if anything by way of inclusion of co-operatives in primary or second level curricula in Ireland. Some secondary schools run a mini-credit union scheme. However, an initiative is currently being developed that would see the introduction of a module on co-operative business in the primary curricula.

Other initiatives to develop management skills for co-operatives' members include training offered by the representative bodies for co-operatives in Ireland including ICOS, ILCU and NABCo (the representative body for housing co-ops). Some of this training is accredited. Training is also offered by the semi-state body Údarás na Gaeltacht; this is mainly aimed at community co-operatives.

3.1.2 Business support services

A wide range of support services are offered by the main representative bodies (ICOS, the ILCU and NABCo) for the various sectors. New and emerging groups which do not fit under the remit of the representative bodies do not always have access to the supports and advice made available by such bodies and as a result may adopt other legal structures. There are no dedicated specialist agencies or development agencies nor finance services for co-operatives in Ireland apart from those provided by the representative bodies and a new body, CSS (see below at 3.1.3). There is some support offered by the semi-state body Údarás na Gaeltachta but only in Gaeltacht-speaking areas. Social finance may be available from organisations such as Ulster Community Investment Trust (UCIT).

This contrasts poorly with the many supports available to those incorporating as a company and is a disincentive to the formation of co-operatives. Unpublished research at the Centre for Co-operative Studies, UCC as well as key witness accounts would suggest that agencies charged with general business development as well as professionals such

as lawyers and accountants are not generally well versed in the nature and distinctiveness of co-operatives and have not studied co-operatives in university. This may serve as a barrier to the development of co-operatives.

3.1.3 Other supports

The current role of the Registrar of Friendly Societies includes the registration of societies and the maintenance of a public office for inspection of documents by the public. Their approval of draft model rules developed by representative bodies is useful. An issue of concern in terms of the repository of public records is the availability and standard of data on co-operatives for the purpose of research and analysis. Currently inadequate breakdown is provided by the Registrar's office for different types of co-operatives, for example, workers' co-ops, which seem to fall under several headings resulting in staff of the Registry being unable to clearly identify workers' co-operatives from their records. Furthermore, our understanding is that co-operatives that register as companies are not identifiable among Company Office records. Records held at the Registrars are not available electronically.

There is a low recognition factor of co-operatives in Ireland. It is not seen as the job of the Regulator to promote co-operatives or provide other supports to the sector. A question remains as to whose job it is. A *Forum for the Co-operative Movement in Ireland* was set up in recent years and may help in this regard. Similarly, the *Society for Co-operative Studies in Ireland*, a long-established but recently rejuvenated organisation may assist. Finally, *Co-operative Support Services* is a fairly new player on the field – offering support and advice to ethnic minorities in developing co-ops.

In terms of any discrimination that there might exist against co-operatives or more precisely societies and/or issues with current legislation, the submission to the Consultation Paper on the I&PS legislation by the Department of Rural, Community & Gaeltacht Affairs (now the Department of Community, Equality and Gaeltacht Affairs) regarding community and local development is interesting. It states that:

"the Company Limited by Guarantee structure would seem to be preferred as a company structure over the Friendly Society, as the full rigours of company law apply, and at the same time the company limited by guarantee offers perhaps better protection to the members of such companies than the provisions of friendly societies. There is also the fact that the Society only exists to benefit the members themselves and is not intended to benefit local communities per se.

In this way, it is possible to exclude members of the community from membership and by extension, limit the benefit to some members of a community over others.

The co-operative or friendly society has been used to good purpose in many local communities and we would conclude that the structure would not be abolished altogether in favour of the company limited by guarantee structure".

This raises more questions than it answers – is the I&PS law unclear to such an extent that a government department which decides relevant policy and funds community projects prefers another corporate structure? Are members of co-operatives not members of communities? Is there a need to more clearly articulate the social benefits of co-operatives? Of course it depends on the nature of "community and local development" in question and government agencies tend to prefer to support non-profits (i.e. those not distributing surplus to members). More discussion and engagement is needed on what uses the co-op model is suited to.

Other supports provided to co-ops in Ireland in the past (namely the Co-operative Development Unit and the Social Economy programme) were criticised by some co-operative commentators as more properly belonging in the co-op sector itself rather than being state-run. One respondent called for funds for the establishment of an independent co-operative development agency governed by the movement.

There has also been a recent proposal to abolish the Registrar of Friendly Societies as a cost-cutting measure as a result of the current economic and financial crisis. The office has already been *de facto* emerged with the Companies Office so this may not be all that significant notwithstanding the issues raised earlier in terms of "capture" of regimes. An earlier report by Forfás, Ireland's national economic development authority and advisory board (2007), into the co-operative sector in Ireland cited a number of issues relating to co-operative development including "the need to recognise the value of the social contribution that co-operatives make" and "the lack of understanding of the co-operative firm".

3.2 Examples of good practice among cooperatives in Ireland

There are many fine examples of co-operatives in Ireland. Cooperatives have played a major role in rural Ireland from producer to service co-ops. Credit unions in Ireland are considered to be an excellent example of their type. More than half the population of Ireland (which is 4.2 million) is a member of a credit union. This is the highest density of credit union membership in the world. Credit unions have played an important role in helping people move out of poverty by providing access to financial services in an inclusive way to every member, not just to chosen customers. Credit unions in Ireland employ over 3,800 people and have an estimated 10,000 volunteers involved in their governance. The sector has savings of nearly €12 billion.

One of the most vibrant sectors of co-operatives in recent years in terms of growth in numbers has been in the public utility sector, namely Group Water Schemes, co-operatives providing a water supply to households that do not receive it from public water

supplies. These co-operatives which emerged with the support of the producer co-ops supply over 50,000 households with water.

Conclusion

The SCE Regulation has been transposed to Ireland without any noticeable impact. There are no SCEs as of yet in Ireland. The national legislation governing co-ops awaits review.

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ITALY

by Antonio Fici and Chiara Strano (*)

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Italian legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the national regulation on SCE. – **1.3.** The designated Authority/ies required for by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Italian legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aims of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives. – **5.** Visibility of the cooperative sector and other related issues.

1. The implementation of SCE Regulation 1435/2003 in Italian legislation

Communitarian regulations are European normative acts which, unlike directives, do not need to be implemented by Member States. In fact, the European regulation "shall be binding in its entirety and directly applicable in all Member States" (art. 288, par. 2, Treaty on the functioning of the European Union: hereinafter "TFEU"). Yet, also with regard to regulations, there is the obligation of Member States to adopt "all measures of national law necessary to implement legally binding Union acts" (art. 291, par. 1, TFEU). This obligation exists both in the case in which EC regulations do not expressly or implicitly require a national implementing law, but the latter turns out to be necessary in fact, and even more so in the case in which they require such a law. This is exactly the case of Regulation 1435/2003 of 22 July 2003 on European cooperative societies (hereinafter "SCE Reg."). In fact, it explicitly requires Member States to take measures necessary for its implementation, namely:

- "to make such provision as is appropriate to ensure the effective application of this Regulation" (art. 78, par. 1);
- "to designate the competent authorities within the meaning of articles 7, 21, 29, 30, 54 e 73", as well as "to inform the Commission and the other Member States accordingly" (art. 78, par. 2);
- "to take appropriate measures" in the case of violation by an SCE of art. 6, SCE Reg. (art. 73, par. 2-5).

* Antonio Fici is author of paragraphs 1, 3, and 4; Chiara Strano is author of paragraphs 2 and 5.

More generally, then, when the SCE Reg. individuates the sources of the regulation, it includes among them "the laws adopted by Member States in the implementation of Community measures relating specifically to SCEs" (art. 8, par. 1, lit. c, *i*).

Besides these obligations, there are also options for Member States.

In fact, the SCE Reg. grants each Member State the possibility to exercise some particular options in order to adapt the regulation applicable to SCEs registered in its territory, if and where that is considered opportune by the Member State[89].

This requires verification and explanation of whether and to what extent the SCE Reg. has been implemented in Italy[90].

1.1. Source, time and modes of implementation

Strictly speaking, Italy has not passed any law or other normative measure implementing the SCE Reg. The SCE Reg. is only the subject of two communications ("circolari" in Italian) from the Ministry of the economic development, which, given their nature of pure administrative acts, may not innovate the legal ordering but only acknowledge it, nor may they provide binding legal interpretations.

These communications are:

- a general communication of 30 June 2006, n. 2903[91];

[89] However, it is worth noting that the identification of such options is not an easy task. In general, in the text and in the table, options are strictly considered only those provisions of the SCE Reg. that give the Member State the possibility to dictate a particular rule on SCE, either different from, or additional to that provided for by the SCE Reg., so that the latter applies if the option is not chosen by the Member State. This is the typical case of art. 6, according to which the Member State may oblige SCEs registered in its territory to locate the head office and the registered office in the same place, while the SCE Reg. only requires the registered office being located in the same Member State in which the head office is situated. Still, there are many situations in which it is not evident whether the SCE Reg. gives a real option to Member States or only refers back to Member States' national law as a condition for the legitimacy of the rule of the SCE Reg. itself or of the SCE's statutes. For instance, if we consider art. 14, par. 1, subpar. 2, it allows an SCE by-law to provide for the admission of investor (non-user) members only if the national law of the Member State in which the SCE is registered so permits. Strictly speaking, this does not appear to be a real option, but only a reference back to the applicable national legislation, although a Member State might well adopt a specific rule stating that SCEs are allowed to have investor members (regardless of whether the same possibility is given to national law cooperatives, since art. 9 of the SCE Reg. operates only in favour of SCEs). The same conclusion is valid with regard to other provisions, such as art. 59, par. 2, among the others. On the other hand, it is neither evident whether the option needs to be expressly exercised by the Member State or it might be considered implicitly exercised through reference to national rules already existing and not specifically dictated for the SCE. For example, should art. 2, par. 2, be intended in the sense that it requires a specific national provision on SCE or in the sense that, where the existing national law generally permits that an organisation whose head office is not within the European Union may take part in the foundation of a national law company, such permission also regards the foundation of an SCE? The same question applies to art. 39, par. 4, among the others.

[90] The directive 2003/72/CE of 22 July 2003, supplementing the statute for a European cooperative society with regard to the involvement of employees, was (late) enacted by legislative decree, 6 February 2007, n. 48, in Gazz. Uff. n. 85 of 12 aprile 2007.

[91] In Gazz. Uff. n. 171 of 25 July 2006.

- and a more specific communication of 26 March 2007, n. 57, which designates the competent authorities according to art. 78, par. 2, Reg. SCE[92].

1.2. Structure and main contents of the national regulation on SCE

In Italy the "implementation" of the SCE Reg. has been entrusted to a ministerial communication having an exclusively (not even binding) interpretive character: communication n. 2903 of 30 June 2006 from the Ministry of the economic development.

Therefore, the nature and purpose of this act impede the ability to speak properly of "implementation" of the SCE Reg., in accordance with the provision of art. 78, par. 1, and the perspective envisaged in art. 8, par. 1, lit. c, *i*, SCE Reg. On the contrary, the communication gives art. 78, par. 1, SCE Reg., only the narrow meaning "to demand a clarifying intervention from Italy", also considering that, as the communication expressly affirms, the SCE Reg. provides a rather complex normative framework.

The piece of the communication in which the Italian approach to the subject of SCE emerges most clearly is where – after taking note of the system of sources as provided for by articles 8 and 9 of the SCE Reg., and of the fact that the current national normative framework on cooperatives (including both the specific rules on cooperatives and those rules that apply to cooperatives as far as they are companies, and moreover recently reformed in 2003) also applies to SCEs – it is stated: "the regulation of sources in art. 8, and the principle of non discrimination in art. 9, shape, taking account of the applicable Italian rules, a completely defined and coherent system, which in Italy has permitted the implementation of the SCE Reg. since 18 August 2006. The present act shares this point of view, and its aim reveals its own character of mere acknowledgment; essentially, the bindingness of the rules dictated for national cooperative societies do not need to be confirmed by issuing a legislative measure, but on the contrary, the objective can be effectively fulfilled through the present communication, which only points out how the *regula juris* (of legislative rank) is already present in the current legal system, and therefore that the regulation of the SCE draws its own *raison d'être* from that and not from the present general administrative act"[93].

Then, the communication raises a particular problem, strictly connected to the very peculiar structure (after the 2003 reform of company law) of national cooperative law, where it affirms: "for SCEs the reference to SPA is consistent", as "from the provisions of the SCE Reg. a legal framework emerges which is inspired by the provisions dictated for the SPA, and whose scope is such as to absorb the incidental presence of those

[92] In Gazz. Uff. n. 82 of 7 April 2007.
[93] In the communication it is moreover specified that this was the reason for not including the SCE Reg. among communitarian acts to be taken into account in the annual communitarian laws (which are the laws through which the Italian legal system is yearly adapted to European law).

parameters according to which in Italy there is the possibility to refer to the provisions on SRL"[94].

The communication then dwells upon some specific provisions of the SCE Reg. by providing "detailed instructions".

With regard to art. 1, par. 4, SCE Reg., the communication explains that an SCE incorporated in Italy may be established as a "mainly mutual cooperative" (hereinafter "MMC") or as an "other cooperative" (hereinafter "OC"), and accordingly be registered in the corresponding section of the register of cooperatives. This statement can be understood only after having explained this, quite typical of the Italian legal system, internal division of the cooperative phenomenon[95].

As regards the option contained in art. 6 (to require the SCE to locate its head office and registered office in the same place), the communication – which moreover would not be a suitable act for the exercise of such option – affirms that it would not be opportune to impose this obligation on the SCE, so as to avoid its being discriminated in respect to other cooperatives and companies.

Then the communication – here again giving an unclear and non binding interpretation (considering the legal nature of the act) – deals with the hypothesis of the transfer of the office by an SCE registered in Italy which, being established as a MMC, was awarded tax benefits[96], thus ending up considering the option mentioned in art. 7, par. 14, SCE Reg. Such an SCE, according to the Ministry, should be treated in the same way as a national law cooperative which would convert into a company, thus exposing itself to the prescribed assets consequences (devolution of indivisible assets to mutual funds)[97].

The preoccupation to avoid an SCE benefitting from Italian tax specific provisions and then, through the transfer of the registered office, subtracting resources from the national cooperative movement, in whose interest these benefits are awarded to the single cooperative is clear. The communication particularly insists on the fact that in this way tax breaks might be used by the SCE for purposes different from those determined by the national legislation, thus discriminating national law cooperatives. And inasmuch as this interpretation clearly gives rise to a legal obstacle to the freedom of transfer within the meaning of art. 7, par. 1, SCE Reg., the communication underlines the link between such interpretation and the "public interest" mentioned in art. 7, par. 14, which may justify the opposition by the competent authority to the transfer of the registered office of the SCE. The communication concludes by affirming that the certificate of art. 7, par. 8, SCE Reg., may not be issued by the competent authority before indivisible assets of the SCE are devolved to mutual funds.

Therefore, the communication *de facto* exercises an option (that in art. 7, par. 14) given by the SCE Reg. to Member States. The only problem is that of the competence of this act

[94] On this point, see *infra* par. 3.1.
[95] On this point, see *infra* par. 3.1. and 3.3.
[96] In the Italian system tax breaks are in fact awarded only to MMCs : see *infra* par. 3.10.
[97] Cfr. *infra* par. 3.9.

to do so, for, as already explained, a ministerial communication is not a law or an equipollent act (as moreover required by art. 7, par. 14, itself, which refers to the "law" of the Member State), and consequently it might not add new rules to the legal system.

With regard to the option in art. 11, par. 4, subpar. 2, SCE Reg., the communication explains that this possibility is already provided for by art. 2365, par. 2, of the Italian civil code. Thus, the exercise of the option is not necessary. In fact, this latter rule only allows statutes (by-law) to entitle the administrative body (organ) to amend the statutes, so that in absence of this provision in the statutes the administrative body of the SCE may not act without authorization from the general assembly.

With regard to art. 21, SCE Reg., the communication applies the same considerations to mergers as to the transfer of the registered office. This means that on this point the same doubts arise as to the possibility of exercising an option of the SCE Reg. through a mere administrative act as the ministerial communication is.

Still with respect to merger, and the option in art. 28, par. 2, SCE Reg., the communication refers to art. 2502, of the Italian civil code, which however expressly awards the right to withdrawal only to members of a company, and not of a cooperative. Therefore the option cannot be considered as chosen by Italy, nor a rule of company laws exists which can be considered directly applicable to the described subject matter.

Finally, the communication pronounces on the profile in art. 73, par. 2, by declaring applicable the term of one year, on analogy with art. 2522 of the Italian civil code. Once more it has to be pointed out that the "appropriate measures" required by art. 73, par. 2, have not been adopted and, by way of contrast, the term of one year is arbitrarily fixed by a ministerial communication on the grounds of a supposed "analogy" with a completely different subject matter (that of the failure of the minimum number of members).

As for the rest, the communication makes a number of comments (some superfluous[98] some very unclear and debatable[99]) both on the interpretation of the SCE Reg. and its connection with national law, and on the applicability of the latter to the SCE. This report can certainly do without considering these comments, taking into account that they are of no relevance for the application of the SCE Reg., given the legal nature of the act where they are placed. Provided the scarce clarity of the communication, perhaps these comments are also useless for those intending to set up an SCE and the professional advising them in this process.

In conclusion, it does not seem that Italy has taken the SCE Reg. seriously enough (as it was required to do), having not really implemented it as it was supposed to. No appropriate provisions to ensure its effective application have been issued in accordance

[98] E.g., when the communication deals with art. 65 by affirming that compulsory destinations provided for by Italian law are safe. This is a superfluous comment, as art. 65, par. 1, itself states that its provisions apply "without prejudice to mandatory provisions of national laws": therefore, on this point there was no need for clarification from the Ministry!

[99] See, for example, the observations on the composition of the management organ in the two-tier system, in relation to art. 37, Reg. SCE, and those on the issue of bonds, in relation to art. 64, Reg. SCE.

with art. 78, par. 1. Options have not been exercised, notwithstanding that the ministerial communication pronounces on some of these. Too much reliance has probably been given to the recently reformed company law. And also the interpretive function, quite important because of the complexity of the sources of the regulation of the SCE, has been delegated to a badly drafted communication, which does not deepen the point in general, but only expresses a few thoughts of scarce relevance, or ventures to suggest interpretations that would require more investigation.

There is no doubt that such an approach does not help spread this new European legal form, even in a environment, such as the Italian, generally favourable and advantageous for cooperatives.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The designation of the competent authorities for the performance of some functions, required by art. 78, par. 2, SCE Reg., was conducted by Italy through the communication from the Ministry of economic development n. 57 of 26 March 2007, taking into account the division of competences between state, regions and autonomous provinces on the field of cooperation.

The table below presents the Italian competent authorities.

PROVISION OF THE SCE REG.	COMPETENT AUTHORITIES
7 – Transfer of registered office	- Regions of Sicily, Region of Val D'Aosta, Region of Friuli-Venezia Giulia, Province of Bolzano, Province of Trento (for those SCEs whose registered office is located in these regions and provinces) - Ministry of economic development (for all the other SCEs)
21 – Opposition to a merger	- Regions of Sicily, Region of Val D'Aosta, Region of Friuli-Venezia Giulia, Province of Bolzano, Province of Trento (for those SCEs whose registered office is located in these regions and provinces) - Ministry of economic development (for all the other SCEs)
29 – Scrutiny of merger procedure	The notary, while constituting the SCE through a merger
30 – Scrutiny of legality of merger	The notary, while constituting the SCE through a merger
54 – Convocation of the general meeting	- Province of Bolzano, Province of Trento (for those SCEs whose registered office is located in these provinces) - Not applicable for all the other SCEs (as Italian law does not provide for the intervention of an authority on this point)
73 – Winding-up	- Regions of Sicily, Region of Val D'Aosta, Region of Friuli-Venezia Giulia, Province of Bolzano, Province of Trento (for SCEs whose registered office is located in these regions and provinces) - Ministry of economic development (for all the other SCEs)

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2. A comment on the implementation of the SCE Regulation in Italian legislation

From a strictly legal point of view, the conclusion of our analysis in par. 1 of this report is that Italy has not implemented the SCE Reg., but only designated the competent authorities in accordance with art. 78, par. 2, SCE Reg., and provided a few non binding interpretations on the relation of the SCE Reg. with national law. Nonetheless, it is worth noting that, in effect, for the incorporation of an SCE in Italy, particular legislative measures seem to be unnecessary, also because the regulation of the register of enterprises of art. 2188, Italian civil code, already provides that any society subject to Italian law must be registered in the register of enterprises, which therefore must be considered the register of art. 11, SCE Reg.[100]. This is demonstrated by the fact that in Italy there are five registered SCEs, and Italy is moreover the EU Member State with the highest number of registered SCEs.

The research on the number of SCEs has been carried out consulting the Register of enterprises via the website www.registroimprese.it. The Italian Register of enterprises does not contain a specific section for SCEs, but assigns them the code “SG” under the specification “legal form” in the search box. However, the research of SCEs via this code does not show the real number of SCEs existing in Italy, because the registration at the Register of enterprises is made by the notary who establishes the company; when registering the society, the notary indicates the “legal status” of the new company and this indication may be wrong. In fact the only three of the five SCEs registered in Italy are under the right code “SG”; the other are registered as “SC” (cooperative society, AgriSocialCoop SCE) and “OO” (social cooperative, Escoop SCE).

Therefore, if one wants to ascertain the number of SCEs registered in Italy, the only way is to check the name of the registered company and verify whether it embodies the words “SCE” or “European co-operative” (which is compulsory according to article 5, para. 4, of the SCE Reg.), and then to read the by-laws of the co-operative in order to verify if this can be qualified as SCE also substantially.

In the end, from the survey carried out through the Italian Register of enterprises, we found 5 SCEs registered in Italy:

- Nova SCE, Società Cooperativa Europea a responsabilità limitata
- AgriSocialCoop, Cooperativa Sociale - Società Cooperativa Europea
- ESCOOP SCE European Social Cooperative – Cooperativa Sociale Europea
- Cooperazione Euro-Mediterraneana SCE a responsabilità limitata
- Fondo salute SCE.

The experiences we collected from the existing Italian SCEs show different reasons leading to this choice, which often correspond to specific needs of the founders. Indeed, in two cases (Nova and ESCOOP), the founders come from different countries and planned to share a working experience. To do so, establishing an Italian cooperative would have

[100] See art. 7, d.P.R. 7 December 1995, n. 581, implementing the law establishing the register of enterprises.

been easier in practice. However, the choice of founding an SCE responds to the basic need to found a cooperative and to create a European network of professionals who share the values of the founders. For one of them (NOVA) the character of transnationality, as the possibility of founding a transnational company instead of a national company with branches, is the added value of the SCE and the reason why this form has been chosen.

Another element taken into consideration is the type of governance that can solve management problems of complex structures. For instance, ESCOOP has chosen to set up an SCE also because it is the best way to combine the desire to establish a cooperative and a complex management structure considering the simultaneous presence of natural and legal persons, private and public entities. In the case of Cooperazione EuroMediterranea, the SCE is used to resolve problems of governance and has been chosen because the division of responsibilities in complex processes of local development is fundamental to the creation of community services involving differentiated responsibilities of the organs and members of the SCE.

In these experiences, the background, needs and history of the founders appear to be the main factors explaining the setting up of an SCE, rather than concrete economic advantages and benefits resulting from the adoption of this legal form. The other positive factor evidenced is that the SCE form seemed to be the best instrument for having a more transparent administration and management.

On the negative side, by analyzing the point of view expressed by the SCE founders and the other stakeholders interviewed, the dissuasive factors for the adoption of this legal form can be summarized as follows:

- complexity of the Regulation, particularly with regard to the system of sources of the regulation, the relationship among them, and the numerous references back to the national legislation, which leads to a number of problems in the application, coordination and interpretation of the whole regulation;
- the complexity of the procedures and the passages necessary for starting up the society; the consistency of the minimum capital required; the difficulties related to the Directive on employee participation; the missing of real elements qualifying the transnational character of this form.
- absence of particular advantages in setting up an SCE instead of a national co-operative operating abroad, while instead the burdens are numerous also due to the imperfections of the regulation. This situation makes it unattractive and not competitive with national cooperative forms;
- lack of information on the characteristics, aims and benefits of the SCE;
- lack of dissemination of the existing experiences. In this regard, it is for example worth noting that no one from the National Federations of Cooperatives interviewed (LegaCoop, AGCI and ConfCooperative) knows the exact number of SCEs registered in Italy;

- the transnational character that the SCE claimed to promote is entirely disregarded, and indeed these transnational elements are missing.

3. Overview of national cooperative law

In the Italian legal system there is a specific regulation for cooperatives. Therefore, the cooperative society can be considered as an autonomous legal type/form of society, different from all the others envisaged by Italian law[101].

Although Italian legislation on cooperatives can be considered adequate for the promotion of this legal form of enterprise (as also shown by the relevant number of existing cooperatives, as well as by the presence of a developed cooperative movement[102]), at the same time it cannot be regarded as simple and straightforward. However, at least its complexity and fragmentary nature follow, as we will point out, a precisely identifiable logic.

First of all, it is worth noting that the cooperative legal form of enterprise has constitutional relevance in Italy. Indeed, according to art. 45 of the Italian Constitution, "the Italian Republic recognises the social function of co-operation with mutual character and without private speculation purposes. The law promotes and favours its growth with the most appropriate means, and ensures, with appropriate controls, its character and purposes".

The substantial regime of cooperatives is divided into a wide and structured group of general rules and a likewise significant group of particular (or special) rules. In this regard, it is worth underlining that:

- general rules, as such potentially applicable to all cooperatives, are mainly contained in the Civil Code (hereinafter "c.c."), at art. 2511 ff.;
- other general rules are included in other laws, among which the following are the most relevant: legislative decree 14 December 1947, n. 1577; law 31 December 1992, n. 59; legislative decree 2 August 2002, n. 220;
- special rules are dedicated to particular types of cooperatives either on the grounds of the type of the good or service produced (see cooperative banks regulated by legislative decree 1 September 1993, n. 385), or the type of the relationship

[101] In Italy the "principle of typicality" (*numerus clausus*) of societies operates, which means that only those types of societies envisaged and regulated by the law are admitted and may be established. These types are: partnerships (informal partnership: *società semplice*; unlimited partnership: *società in nome collettivo*; limited partnership: *società in accomandita semplice*), companies (joint-stock, public limited liability company: *società per azioni*; private limited liability company: *società a responsabilità limitata*; joint-stock limited company: *società in accomandita per azioni*), and cooperatives. European legal types (European company and European cooperative society) are of course admissible too.

[102] Estimations for 2005 are of 71,464 cooperatives (compared to a total number of cooperatives in Europe estimated at 250,000 in 2008, according to Cooperatives Europe), 11,490,000 members (1 in 5 Italian citizens), 119 billions € of turnover, and 1,249,000 employees (source: Zamagni e Zamagni, *La cooperazione*, Bologna, 2008).

between the cooperative and its members (see worker cooperatives regulated by law 3 April 2001, n. 142), or the aim pursued (see social cooperatives regulated by law 8 November 1991, n. 381);

- the relationship between general rules and special rules on cooperatives is the following: “cooperatives regulated by a special law are subject to general rules only if compatible” (art. 2520, par. 1, c.c.);
- also apply residually (that is, for matters not regulated by general or special rules on cooperatives: see art. 2519, par. 1, c.c.) and if compatible to cooperatives the rules that govern two different types of companies: private limited liability company (SRL: *società a responsabilità limitata*) and joint-stock (public limited liability) company (SPA: *società per azioni*); more exactly, either the rules on the former or the rules on the latter, depending on the size of the cooperative or an express choice formulated in its by-laws[103].

The following analysis will present an overview of Italian cooperative law as complete as possible, but rather simplified in order to comply with the objectives of this research. The attention will be mainly directed to the general rules of Italian cooperative law, though remarking on the main differences which special rules present in comparison with the former.

3.1. Sources and legislation features

As previously stated, a specific, broad, and complex cooperative law exists in Italy.

There are general rules applicable to all cooperatives, the majority of which are inside the Civil code (in the part of the Civil code dedicated to enterprises and societies). There are special rules on particular types of cooperatives, among which the most important are those on cooperative banks, worker cooperatives, and social cooperatives. Still, special rules only deal with the peculiar aspects of the specially regulated cooperative, without normally invading the field of general rules, which therefore constitute the core of national cooperative law.

The rules on private limited liability company or those on joint-stock (public limited liability) company may also apply to cooperatives, but only in the absence of a specific cooperative rule, either general or special, and as long as they are compatible.

[103] The default rule is that these rules are those on joint-stock (public limited liability) company (see art. 2519, par. 2, c.c.); but the by-laws of the cooperative may opt for the rules on the private limited liability company in case the cooperative has less than twenty members and assets not superior to 1 million € (art. 2519, par. 2, c.c.). Cooperatives made up of 3-8 people are necessarily subject to the rules on the private limited liability company.

3.2. Definition and aims of cooperatives

Art. 2511, c.c., defines cooperatives as "societies with variable capital and mutual purpose, registered in the register of cooperative societies of article 2512, second paragraph, and article 223-*sexiesdecies* of the provisions for the implementation of the present code".

In the definition of a legal type of society and for its distinction from other legal types, the aim which the law assigns to it is the most relevant element. The law ascribes to cooperative societies a "mutual purpose". This is a distinctive and traditional formula of Italian law, although substantially referable to the purpose which the SCE Reg. and other national laws assign to cooperatives.

In fact, for an Italian cooperative, the "mutual purpose" implies the obligation to perform an activity with and in the interest of its own (cooperator/user) members, with the aim of satisfying their need to work or to exchange (either buy or sell/supply) goods and services. An Italian cooperative shall therefore, depending on the circumstances:

- employ its members (worker cooperatives);
- exchange with its members (consumer cooperatives and production cooperatives).

All this, as said, shall be done in the individual interest of cooperators, that is to say, trying to apply the most favourable conditions, consistent with respect to the economic equilibrium of the enterprise and the protection of the social interest.

What stated above stems unequivocally from the definition of the MMC and the criteria of its distinction with OCs (see articles 2512 and 2513, c.c.).

It must be underlined, in fact, that the reform of company law of 2003 (which entered into force in 2004) has introduced this unique (in the global legislative panorama) distinction between MMCs and OCs, to which it has particularly connected tax law consequences, stating that tax breaks are exclusively reserved for MMCs.

MMCs are those that operate predominantly with their members (the exact meaning and content of this concept will be explained further)[104], while OCs are not subject to this latter condition.

In addition, MMCs are subject to particular assets restraints which do not apply at all or apply only to a certain extent to OCs[105]. MMCs shall be registered in a special section of the register of cooperatives[106].

Therefore, the conclusion is that according to Italian law the aim of a cooperative is to provide jobs or exchanges of goods and services to its members, through the conclusion of agreements providing the most possibly favourable conditions for members. This purpose is called "mutual purpose" by Italian law, and does not substantially differ from the purpose the SCE Reg. assigns to an SCE (see art. 1, par. 3).

[104] See *infra* par. 3.3.
[105] See *infra* par. 3.6.
[106] See *infra* par. 3.8.

If compared to cooperatives as defined by the Civil code, which are characterised by mutual purpose, social cooperatives as defined by law 381/1991 are special because they do not pursue a mutual aim, and therefore the interest of their members, but the general interest of the community. From this perspective, they are pure social (and non-mutual) enterprises.

According to art. 1, par. 1, law 381/1991, "social cooperatives aim to pursue the general interest of the community for the human promotion and social integration of citizens through: a) the management of social-health and educational services; b) the performance of agricultural, industrial, commercial, service or other activities for the working integration of disadvantaged persons".

3.3. Activity

Italian cooperatives may perform any economic activity. There are no specific restrictions linked to the cooperative legal form *per se*. But of course, if the law provides for specific rules and/or restrictions related to the nature of business, these apply to all the legal forms carrying out that business, including cooperatives.

They may also operate with non members, but only on the condition that their by-laws provide for this possibility (art. 2521, par. 2, c.c.). Therefore, "pure" mutuality (that is, to act only with members) is not a legal requirement.

In this latter regard, however, the distinction between MMCs and OCs must be recalled. The former, in fact, are subject to a limit in the activity with non members, as they are bound to operate predominantly with their members. This condition shall be analytically reported in the balance sheet (art. 2513, c.c.). The predominant activity with members requirement is fulfilled only when:

a) in consumer cooperatives, sale proceeds from members' consumption are superior to 50% of total sale proceeds;

b) in worker cooperatives, labour costs for members' jobs are superior to 50% of total labour costs;

c) in production cooperatives, manufacturing costs for goods and services provided by members are superior to 50% of total manufacturing costs.

On the contrary, OCs are not subject to this limit in the activity with non members, and they may even act predominantly with non members (but in this case, being not mutual, they are not eligible for tax benefits).

In conclusion, Italian law envisages both cooperatives with a (pure or at least) predominant mutual character, and cooperatives without mutual character. The latter, however, are not eligible for tax benefits (according to art. 45 of the Constitution, which recognizes the social function of cooperatives with a mutual character).

3.4. Forms and modes of setting up

A cooperative shall be set up through a public act (art. 2521, c.c.), namely, an act drafted by a notary. The act of incorporation is normally divided into two separate acts: the real act of incorporation (which contains all the elements necessary for the identification of the society: name of the society, place of the registered office, name of members; aim; social object; etc.), and the statutes (by-laws), which contain the rules on the functioning of the society.

The public act shall be filed with the register of enterprises (art. 2523, par. 1, c.c.). Only from this moment can the cooperative be considered legally existent and acquires the legal personality, being therefore characterised by a complete "patrimonial autonomy" (i.e., members are not liable for more than the amount subscribed: art. 2518, c.c.).

The locution "cooperative society" shall always be included in the name of the cooperative (art. 2515, par. 1, c.c.).

3.5. Membership

The minimum number of members is three (art. 2522, par. 2). In some special laws a higher number is required[107].

In general, members should be able to carry out the activity (of work or exchange) with their cooperative (thus, they can defined user members); therefore, those that do not have the requisites or qualities for conducting the activity should not be admitted as members. These requisites are not laid down by the law, but shall be determined by the statutes of the cooperative, taking into account the mutual purpose and the economic activity of the cooperative (art. 2521, par. 1, n. 6; 2527, par. 1, c.c.).

Also non-user members may be admitted, and among them investor members (if the by-law expressly provides for their admissibility), whose interest is not in the "mutuality", i.e., in working and exchanging with the cooperative, but only in the remuneration of the subscribed capital. Investor members have the same corporate rights as user members, and the statutes might even award them certain administrative and/or financial privileges (we will turn back to this point below).

In social cooperatives of law 381/1991, also public or private entities interested in the development of the activity of the social cooperative, voluntary workers, as well as disadvantaged workers, may become members.

As to credit cooperative banks it is provided by the law that members must reside (or have the registered office or operate continuously) in the territory where the bank operates (art. 34, par. 2, legislative decree 385/1993)[108].

[107] E.g., in cooperative banks the minimum number is 200 members.

Given the rule on the variability of the capital of a cooperative, the admission of new members does not require and imply amendments of the incorporation act or the statutes, nor disclosure or filing with the register of enterprises or other registries.

In general, the admission of new members is regulated by articles 2527 e 2528, c.c., according to which:

- the by-laws determine the requirements for admission of new members and the related procedure, according to non discriminatory criteria, consistent with the aim and the activity performed by the cooperative;
- admission is subject to approval by administrators, who shall justify refusal within sixty days from the presentation of the request for admission;
- candidates refused membership may appeal to the assembly (art. 2528, c.c.);
- administrators are required to illustrate the grounds for the decisions made regarding admission of new members in the report annexed to the annual balance sheet.

Therefore, it can be observed that the principle of "openness" of the cooperative (in Italy also referred to as the "principle of the open door") is not strictly implemented by Italian law, as it does not recognize a right to admission (but this is a principle which in reality is hard to imagine ever being converted into a specific legal rule), but only protects to a certain extent the interest of third parties to become members.

3.6. Financial profiles

Cooperatives are societies with a variable capital. The variability of the capital is an element of the definition of a cooperative under Italian law (art. 2511, c.c.).

The variability of the capital implies that a cooperative, as opposed to companies whose capital is fixed, may admit new members without amending its incorporation act or the statutes, or disclosing or filing with the register of enterprises or other registries (art. 2524, par. 2). The capital variability rule is consistent with the open character of the cooperative (it favour such openness), though, as previously said, a right of admission on third parties does not exist.

The variability of the cooperative capital affects its function. Being variable, the cooperative capital may not assume the function of creditor protection. This, together with the fact that the capital is not relevant in terms of voting power (given the democratic principle of administration)[109], makes the capital of a cooperative diverse from that of other

[108] However, it has to be underlined that, according to the Italian legislation, cooperative banks are of two types: "popular banks", which are not obliged to act predominantly with their members, and "credit cooperative banks", which are obliged to do so. The regulation of the two legal forms is partially different. For example, as to the rule just mentioned in the text, this only applies to credit cooperative banks and not to popular banks. While, for example, the rule on the minimum number of 200 members applies to both.

[109] See *infra* par. 3.7.

companies, as it does not play either a role of guarantee in the interest of creditors, or an organizational role among members.

The capital of a cooperative is divided into shares, each having nominal value of 25 € up to 500 €.

Shares may not be transferred without the authorization of administrators (art. 2530, comma 1). The by-laws may even provide for their non-transferability, but in this case members are entitled to withdrawal two years after the date of admission (2530, comma 6).

Each member may not hold more than 100.000 € of capital, but this rule does not apply to members which are legal entities and financial members[110].

Italian law deals with the allocation of profits in a cooperative, first of all providing for some compulsory destinations, whose purpose is to reinforce the social function of cooperatives, as well as their financial structure, considering the limited relevance of their capital.

Cooperatives (being MMC or OC) shall appropriate to a legal compulsory reserve fund at least 30% of annual total profits, regardless of the amount of the legal reserve (art. 2545-*quater*, par. 1)[111]. This compulsory contribution to a legal reserve is a solution to the limited relevance of the capital due to its variability, and moreover it reinforces the non-distribution constraint and the solidarity aspect of a cooperative (in terms of solidarity among cooperators).

A cooperative (being MMC or OC) shall allocate 3% of annual total profits to the mutual funds for the promotion and development of cooperation. These are funds established (according to article 11, law 59/1992) and headed by the representative organisations of the cooperative movement with the aim of promoting and financing the development of new cooperatives in various manners, as for example through the participation in their capital as founders. Also, in the event of dissolution of a MMC, its residual assets have to be allocated to these funds. These too are measures directed to strengthen solidarity among cooperatives (an expression used in Italy to this regard is that of “system mutuality”) and therefore their social function.

As to the allocation of the remaining part of profits, there is a distinction between MMCs and OCs.

The former are subject to art. 2514, which provides a number of restrictions on profit distribution. The latter are only obliged to define in their statutes the maximum percentage of profits that may be distributed to members (2545-quinquies). Special rules apply to cooperative banks.

Art. 2514, c.c., states that MMCs:

[110] A different rule also applies to cooperative banks.
[111] 10% for popular banks (art. 32, par. 1, legislative decree 385/1993); 70% for credit cooperative banks (art. 37, par. 1, *ibidem*).

- may not distribute dividends on the subscribed capital superior to the maximum interest of postal bonds increased by 2.5 points;
- may not distribute reserves to user-members (cooperators);
- may not remunerate the financial instruments subscribed by user-members more than the maximum interest of postal bonds increased by 4.5 points;
- shall allocate, in all cases of dissolution, all their assets, subtracting paid-up capital, to the mutual funds for the promotion and development of cooperation;
- may assign to withdrawing members only the paid-up capital, or a smaller amount in case of capital loss.

Under Italian law, therefore, a cooperative is not a total not-for-profit, but a partial not-for-profit organisation. This does not hold true for OCs, which are not subject to the same non-distribution constraints as MMCs (but only, as said above, to the mandatory destinations of 30% to legal reserve funds and 3% to mutual funds).

What was stated above regarding the distribution of profits to members requires drawing the distinction between "dividends" and "refunds", which in theory is clear under Italian law, as it mentions both separately and treats them differently under diverse provisions.

Dividends are an amount provided as capital remuneration. Art. 2514 refers to that.

While refunds are an amount provided as and in proportion to the quantity or quality of the transactions each member has with the cooperative (2545-*sexies*, par. 1). Indeed, cooperative refunds should be more properly considered not as a profit distribution, but as a restitution to members of part of the price paid for buying goods and services from the cooperative, or as an additional remuneration of members for their work execution or provision of goods and services to the cooperative[112]. Therefore, the concept of "cooperative refund" needs to be clearly distinguished from that of "dividend on paid-up capital".

In general no limit to the distribution of profits as refunds exists[113]. But refundable profits should be considered only those that result after the deduction of compulsory allocations[114].

The 2003 reform of cooperative law sought to reinforce cooperative finance by new means.

[112] See in this sense art. 12, Presidential decree n. 601/1973, and art. 3, par. 2, lit. b, law n. 142/2001.

[113] A limit of 30% of the salary is laid down by the law on worker cooperatives (see art. 3, par. 2, law 142/2001).

[114] It is not clear whether (in cooperatives which also act with non members) only that part of profits which comes from the transactions with members may be refunded or also that which stems from the transactions with non members. In the first sense, see the ministerial communication n. 53/E of 18 June 2002, which, in dealing with the specific tax treatment of cooperative refunds (see *infra* par. 3.10), affirms: "cooperative refund, that is, the restitution to members of part of the price paid for goods and services or the extra-remuneration for work and in general good and service provision by members, is possible only if the balance of the activity performed by the cooperative with its members is positive. What may be refunded is only the documented surplus from transactions with members and not from those with non-members".

In this regard, a general rule may be found in article 2526, par. 1, c.c., which states that "the statute may provide for the issue of financial instruments, in accordance with the regulation on limited liability companies".

The freedom given to cooperatives to draft their statutes accordingly is very wide. Indeed, statutes may define financial and administrative rights of financial instrument holders (art. 2526, par. 2, c.c.). As to the financial rights, even in MMCs, financial instrument holders can be remunerated without limit (the only limit in MMCs regards financial instruments held by user-members)[115]. As to the administrative rights, the law only sets the limit that the category of financial instrument holders cannot have more than 1/3 of the total votes in the member assembly (art. 2526, par. 2, c.c.). The right to elect administrators could also be awarded to financial instrument holders, but with the maximum of 1/3 of total administrators (art. 2542, par. 4, c.c.).

Beyond this, the concrete characteristics of issued financial instruments will depend on the statute: a cooperative may issue equity-financial instruments (and therefore admit investor members), debt-financial instruments (e.g., bonds), or hybrids (e.g., participative bonds, that is, bonds related to the performance of the enterprise, or shares awarding a minimum return, regardless of the performance of the enterprise, but not voting rights).

3.7. Organisational profiles

Under Italian law, "each member has a vote" in the general assembly, whatever the amount of the subscribed capital" (art. 2538, par. 2, c.c.). Therefore, in a cooperative, voting power is in general not linked to the amount of the subscribed capital (capitalistic principle of administration), but to membership itself (democratic principle of administration).

However, Italian law contains a few exceptions to the rule "one member, one vote". More exactly, it gives statutes the option to derogate from the rule in certain cases and within certain limits.

Firstly, a by-law of an Italian cooperative may assign to a member which is a legal entity (a cooperative or other legal forms of organisation) more votes, with a maximum of five, in relation to the capital held or the number of its members (art. 2538, par. 3, c.c.).

This is not an unusual exception and can be easily explained by the need to adapt the democratic principle to secondary cooperation (even though, in Italian law, this exception could also apply to primary cooperatives comprising both individuals and cooperatives or other organisations), as already envisaged by the 4th ICA principle. In fact, if a cooperative is formed of cooperatives (or other organisations) and one of them has more members than the others, it seems more democratic and conforms more closely to the principle "one member, one vote" that this cooperative is awarded extra-votes, even considering that the

[115] But not using reserves which are legally indivisible.

law limits them to five. It is more difficult, on the other hand, to justify the same rule when the by-law criterion for awarding more votes is not the personal one above, but the capital held, unless we assume (but this argument would be very weak) that the amount of capital is a sign of the size of the cooperative in terms of members.

Secondly, a cooperative by-law may allocate and determine votes in proportion to the transactions between the member and the cooperative. But this exception is possible only in cooperatives among entrepreneurs (art. 2538, par. 4, c.c.), regardless of whether they are legal entities or natural persons.

This is a more significant exception, given that it is not limited to secondary cooperatives and meets a different limit: each member, to whom more votes have been assigned under this rule, may not have more than 10% of the total votes in each assembly, and all these preferred members together may not have more than 1/3 of the total votes in each assembly.

Considering this exception, the democratic principle seems to have been reinterpreted by the Italian reform (at least with regard to cooperatives made up of entrepreneurs), in the sense that it only forbids the control of the cooperative by one member or a category of members, but does not prescribe that each member have equal voting rights. Voting is not linked to membership *per se*, but directly to the degree of the interest each member has in mutuality ("mutualistic" criterion of vote assignment).

Thirdly, a cooperative by-law may determine voting rights in the election of the supervisory body in proportion either to the capital held or mutual exchanges (art. 2543, par. 2, c.c.).

This is a different exception if compared to the previous, as:

- it does not apply only to cooperatives made up of entrepreneurs, but all cooperatives;
- it only applies to the appointment of the supervisory body;
- the criterion of determination may also be capitalistic (the amount of the capital held).

Nevertheless, this exception has perhaps been provided for the same reasons as the previous. It can be a solution to the problems arising in cooperatives with inhomogeneous membership, therefore being an incentive to set up a cooperative even under this condition. On the other hand, as to the capitalistic criterion of determination, the fact that the exception only applies to the election of the supervisory body reduces the risk of undermining the social function of the cooperative structure, even though a departure from the principle of democracy is evident in this respect.

Finally, the statutes of a cooperative may assign a multiple vote to investor members within specific limits (applying both to each investor member and investor members as a whole), as already pointed out.

In order to promote member participation, Italian law allows members to delegate the power to vote (i.e., to appoint a proxy to represent him/her at the general meeting). But the

power to vote may be delegated only to another member, and each member may not represent more than ten members (art. 2539, c.c.)[116].

Another measure thought to favour member participation is to consent a by-law to provide for the vote by mail, e-mail, or other telecommunication devices (art. 2538, par. 6, c.c.).

The by-law may then provide for separate assemblies (which in some cases are mandatory[117]) with regard to certain subjects or in the presence of different categories of members. In this case, each separate assembly elects its representative, and only representatives vote in the general assembly (art. 2540, c.c.).

Before the reform of 2003, a cooperative by-law had limited or rather no freedom to define the system of administration and control of the cooperative. Therefore, the cooperative structure could only conform with the so-called "tripartite" (or three-tier) system of administration and control. There was, furthermore, a strong insistence on the principle of cooperative self-management, to the point that the law forbade a cooperative to appoint non-member directors.

In order to permit a more efficient and effective management of a cooperative, the recent reform enables cooperative statutes to choose among three different systems of administration and control: the so-called "tripartite" ("three-tier"), "dualistic" (two-tier") and "monistic" ("one-tier") systems. It is worth noting that these options are substantially taken from the regulations governing the main Italian legal form of for-profit enterprise, namely, the "*società per azioni*" (public limited liability company), with only a few adaptations to the cooperative form. In addition, the influence of the SCE Regulation is also evident, although Italian law models do not exactly correspond to those of the SCE Regulation.

The default system is the traditional tripartite one, since the other methods must be expressly opted for by statutes. It is divided into three bodies: the member assembly, the board of directors and the board of supervisors.

Among its main ordinary functions, the member assembly appoints and removes directors and supervisors and approves annual balance sheets.

Directors are in charge of the management of the company and they may perform all the acts necessary for the implementation of the social object (art. 2380-*bis*, par. 1, c.c.). At least the majority of them shall be members (therefore, the other directors can be non-members) (art. 2542, par. 2, c.c.).

Supervisors verify the duties performed by directors, the observance of the legal and by-law rules governing their action, as well as their general good faith. Only registered auditors, registered professionals (such as lawyers and notaries), and law or economics

[116] This rule only applies to cooperatives subject to the regulation of public limited liability companies (see above in the text). When the member is an individual entrepreneur, he/she may delegate the power to vote also to his/her partner, relatives within the third degree, and relatives in law within the second degree that collaborate with the enterprise.

[117] Cooperatives with more than 3.000 members and which run their activities in several provinces, or with more than 500 members and several types of mutual relationships (art. 2540, par. 2, c.c.).

professors may be appointed as supervisors (although at least one supervisor must be a registered auditor).

A cooperative shall also appoint at least one registered external auditor for the specific aim of auditing annual accounts, unless the board of supervisors is entirely formed of registered auditors, in which case the board of auditors can also be in charge of this particular function[118].

The one-tier ("monistic" in the Italian civil code) system is not substantially different from the three-tier one, except regarding the following points:

- supervisors are not directly appointed by the assembly, but by the board of directors from among its members; at least one supervisor must be a registered auditor; supervisors are non-operating members of the board of directors (they cannot manage the company) and all of them together constitute an internal body of the latter (named "auditing committee");
- the external audit of accounts is always required.

This system has been criticised by some Italian scholars as supervisors are appointed by the very persons who they have to supervise. But this criticism is unpersuasive, since, after all, members identify supervisors, although indirectly, through their first appointment as directors. By way of contrast, this could be an effective administration system, because, on the one hand, it favours the circulation of information between administrators and supervisors, both being part of the same body, and on the other hand always requires an internal and external audit (which can be, on the other hand, absent in smaller cooperatives adopting the three-tier system[119]).

The two-tier ("dualistic" in the Italian civil code) system is divided into three bodies: the member assembly, the supervisory body and the management body.

Under this system, the assembly of members has fewer functions than in both the others. It does not appoint (not even indirectly) managers (as in the one-tier system), it does not approve annual accounts nor is it in charge of other central issues, such as the decision on the recourse advanced by third persons against the denial by administrators of their request to become members; the approval of general regulations on the mutual relationship between the cooperative and its members; etc.

The supervisory body is the central body of this system of administration. It is appointed by the assembly from among its members, is in charge of the election of managers, controls their conduct, approves annual accounts (and is in charge of those key decisions which we referred to before as not being under the responsibility of the assembly), and

[118] Under the three-tier system, smaller cooperatives (whose capital is not greater than € 120,000, and do not simultaneously go beyond two of the following limits: statement of assets € 4,400,000; proceeds € 8,800.000; 50 employees on average, and do not issue "non-participative" financial instruments, are not obliged to appoint either a supervisory body or an external auditor (see art. 2543, para. 1; 2477, para. 2, 3; 2435 *bis*, para. 1, c.c.).

[119] See note 30 above.

may also be given by statute the “high administrative” power to determine strategic, industrial and financial plans of the enterprise.

The supervisory body is formed of at least three persons, one of whom must be a registered auditor.

The management body is formed of at least two persons, also non members of the cooperative. It manages the enterprise with the same powers as the body of directors under the three-tier system.

Under this system the external audit of accounts is always required.

The two-tier system is the system which, more than the others, strongly divides property and control of the enterprise, in the sense that members do not directly control the enterprise, as control is in the hands of the members of the supervisory body and the managers.

3.8. Registration and control

Italian cooperatives are registered in two distinct registers: the register of enterprises and the registers of cooperatives.

The registration in the register of enterprises is necessary for the existence of the cooperative as a legal entity and the acquisition of the legal personality.

But after the recent amendments to art. 2511, c.c. (this article was lastly modified in 2009), the registration in the register of cooperatives seems to have also become an essential element of the cooperative society, going beyond its original function as a condition of eligibility for tax and other benefits[120].

The register of enterprises is held and run by the Chambers of Commerce (one for each Italian province). The cooperative shall register in the register of enterprises of the province in which it wishes to establish its registered office.

The register of cooperatives is held and run by the Ministry of economic development (and by the Autonomous Provinces of Bolzano and Trento for cooperatives whose registered office is located in their territory). It is divided into two sections: one for MMCs, and one for OCs.

Italian cooperatives are subject to public control (named “cooperative vigilance”)[121]. This control is regulated in all aspects (subjects, forms, sanctions, etc.) by the legislative decree 220/2002. The ordinary form of control (named “cooperative revision”) mainly concerns the “mutual nature” of the cooperative, having regard to the effectiveness of membership, the participation of members to the corporate life and to mutual transactions with the cooperative, the absence of for-profit aims, and the eligibility for tax and other benefits, as

[120] In reality, the cooperative does not need to demand the registration in both registers; in fact, the communication provided to the register of enterprises shall be forwarded by the Chamber of Commerce to the Ministry (or the Autonomous Provinces) which runs the register of cooperatives.

[121] Art. 45 of the Constitution requires opportune forms of control for cooperatives.

well as patrimonial solidity (art. 4, legislative decree 220/2002). The control normally takes place once in two years (once a year for social cooperatives), but extraordinary inspections are possible. Revisions are conducted by recognized organizations of the cooperative movement in case of cooperatives which are associated to these organizations; by the Ministry of the economic development for cooperatives not associated to any representative organization. The controlled cooperative receives a certificate attesting that. While, where irregularities are found, the cooperative is invited to regularize the situation if possible. Diverse measures can be taken by the supervisory authority where no regularization has occurred or this is not possible due to the type of the violation verified. These measures range from the substitution of managers with managers designated by the supervisory authority toward the dissolution of the cooperative.

3.9. Transformation and conversion

Only an OC may be converted into a company or other legal form of enterprise (art. 2545-*decies*, c.c.). Therefore, MMCs should first lose their quality of MMCs, which is possible by simply modifying the by-law rules applying art. 2514, c.c. (art. 2545-*octies*, c.c.)[122].

In the event of conversion, the cooperative shall devolve its assets to the mutual funds, only subtracting the paid-up capital, and if needed, the additional amount necessary for establishing the minimum capital of the company into which the cooperative is converted (art. 2545-*undecies*, c.c.).

Therefore, conversion is possible, but strongly discouraged by the provisions regulating it.

3.10. Specific tax treatment

A specific tax treatment of cooperative societies in Italy is due to the Constitutional provision of art. 45 recognising the social function of cooperatives and requiring legislators to promote them with appropriate means.

When dealing with cooperative tax treatment in Italy, it is important to take into account the distinction between MMCs and OCs, since only the former are eligible for tax benefits; however, as we will see, this does not mean that OCs are completely excluded from specific tax measures regarding cooperatives, probably because Italian legislators considered that not all specific tax provisions are to be considered as beneficial in the strict sense.

The most important specific provision is that on the exemption of cooperative income from the corporate income tax.

[122] In this case, the MMC shall appropriate all net assets to indivisible reserve funds.

More particularly, only 30% of income is subject to the corporate income tax (20% for agricultural and small fishery cooperatives and their consortia), while the rest is not subject to this tax where it is allocated to a legal or statutory indivisible reserve fund, which cannot be distributed to members, neither during the cooperative existence nor in case of its dissolution (art. 12, law 16 December 1977, n. 904, and art. 1, par. 460, law 30 December 2004, n. 311)[123].

This rule also applies to OCs, but the exemption is limited to 30% of income allocated to a statutory indivisible reserve fund (art. 12, law 16 December 1977, n. 904, and art. 1, par. 464, law 30 December 2004, n. 311)[124].

On the contrary, all social cooperative income, on the condition that it is appropriated to an indivisible reserve fund, is exempt from the corporate income tax (art. 12, law 16 December 1977, n. 904, and art. 1, par. 463, law 30 December 2004, n. 311).

Another significant tax law provision, which seems to be perfectly consistent with the particular aim of a cooperative, is that which considers as non-taxable income the amount of profits distributed to members as "cooperative refunds", that is "as restitution of a part of the price paid for goods and services bought by members, or as additional remuneration for goods and services provided by them" (art. 12, Presidential decree 29 September 1973, n. 601)[125]. However, members pay taxes on the amount obtained by way of refunds from their cooperative.

Several tax measures are specific for social cooperatives. An important one is VAT tax exemption or, if more convenient for the social cooperative, VAT tax reduction to 4% on services provided by a social cooperative (art. 10, n. 27-*ter*, and tab. A, 2nd part, n. 41-*bis*, Presidential decree 26 October 1972, n. 633).

3.11. Existing draft proposing new legislation

No existing draft proposing new legislation on cooperatives exists.

[123] Credit cooperative banks, which are obliged to allocate 70% of profits to a reserve fund, pay the corporate income tax only on 27% of profits so allocated.

[124] In this regard, the difference between the concept of legal compulsory reserves and that of indivisible reserves has to be underlined, as a compulsory reserve law provision does not necessarily imply its non distribution among members. In fact, under Italian law, OCs are subject to the provision on the destination of 30% of total annual profits to the legal reserve fund, but they may distribute this fund to members, both in case of withdrawal and dissolution. Thus, the legal reserve is not indivisible for OCs. By way of contrast, all reserve funds, being legal or statutory, are indivisible for MMCs.

[125] On the concept of cooperative refund and its distinction from that of dividend, see above par. 3.6.

3.12. Essential bibliography

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4. The SCE Regulation and national law on cooperatives

Although the reform of Italian cooperative law took place before the enactment of the SCE Reg., it did take into account the text of the incoming SCE Reg. and its main regulatory contents[126]. Many solutions have been taken from the SCE Reg. (e.g., the two-tier and the one-tier systems of administrations; the regulation of new member admission),

[126] The delegation law of 2001 (then implemented by the legislative decree of 2003) on the reform of cooperative law expressly stated that this reform was to be consistent with EU law, and particularly with the project of a statute for the European cooperative society.

though the corresponding Italian rules are not exactly the same as the SCE Reg. provisions.

5. Visibility of the cooperative sector and other related issues

Supporting measures for cooperatives

Public measures of support for cooperatives may be hierarchically systematized according to the level where they are located.

State measures

At the national level, cooperatives, being enterprises, have general incentives and financing measures within the economic measures allocated by the state to foster entrepreneurship.

Besides that, there are also specific measures for cooperatives.

It should be noted that Articles 45 of the Italian Constitution state that the Republic recognizes the social function of cooperatives and promote their development. Article 117 of the Constitution contains a list of matters of exclusive legislative jurisdiction of the State and a list of matters of concurrent legislation State-Regions. In matters of concurrent legislation, the legislative power is due to the Regions, which can act in the framework fundamental principles which are previously determinate by law of the State.

From this legal basis Italian regions adopted a law on the promotion and development of cooperatives.

We report the most relevant laws and measures of support for cooperatives.

Law No 49 of 27 February 1985 (Law Marcora) has created two funds for cooperatives: FONCOOPER and Fondo Speciale. The first is a fund that provides low-interest loans aimed at increasing productivity and employment through the modernization of the structures of production; the fund increases the value of the products by increasing market competitiveness, and promoting the rationalization of the retail sector.

Since 2000, following a legislative amendment, the fund is managed by the regions under the name Fondo Unico Regionale.

The same law 49/85 Title II created the Fondo Speciale to safeguard employment levels.

This fund provides grants to finance companies promoted by the cooperative movement to protect and promote employment. In 1986 the 3 confederations (Legacoop, Confcoop and AGCI) created the CFI (Cooperazione Finanza Impresa) to manage together the fund of 3%. In 2003, CFI has redefined and expanded its strategy: it finances start-up operations, development, consolidation and repositioning of cooperatives.

Law No 215 of 25 February 1992 established the National Fund for the development of female entrepreneurship. Beneficiaries of the fund are small businesses run predominantly

by women, namely the individual firms whose owners are women, partnerships and cooperatives with at least 60% female members, corporations where at least 2/3 of shares are held by women and the board is composed of at least 2/3 women.

This fund is managed jointly by the state and the regions, for which the state allocates quotas to individual regions based on various criteria set by decree.

Regional measures

As mentioned above, the Constitution, art. 117, leaves to the regions the legislative competence on cooperatives.

On this basis, regions approved a regional law on the promotion and development of cooperation.

These laws establish ordinary measures for cooperatives and generally regulate the following aspects: capitalization of cooperatives and their consortia, regional funds, support for the creation of new cooperatives, creation of a "Council of Cooperation" which has a consultative (on draft laws and regulations concerning the matter of cooperation), proactive (for activities and interventions related to cooperation and to formulate proposals on the allocation of resources for regional cooperation) and promotional role (conferences, meetings, seminars on the issues of cooperation).

On the basis of these laws sometimes other special laws have been promulgated for particular sectors: agriculture, handicrafts, distribution and other sectors.

Besides these ordinary measures, there are regional measures of support, called “anti-crisis”. There are examples of calls aiming at the distribution of grants to support co-operatives and associations (e.g. determination 583/2009 Lazio Region), which provide contributions for investment in fixed assets (purchase machinery, equipment, cars, etc..) acquisition of real services (design, promotion plans, etc.) up to 50% of eligible expenses to a maximum of 80.000 Euros. There are measures to help cooperatives within the anti-crisis measures provided by the regions in support of business in general. For example, the Emilia Romagna Region has approved measures to support business and regional development in the regional budget for 2010 totalling 70 million Euros. Within the package are also provided measures (for a total of 1 million Euros) in favour of new cooperatives and consortia, formed in the last two years, including new cooperative companies set up by workers' of companies in crisis or precarious employees.

This measure, designed to promote economic recovery or the creation of cooperatives by unemployed workers, reflects a trend that is developing in all regions, with interventions that can take the form of calls, loan funds, or a dedicated tax regime. One example, the Marche Region[127], “given the economic crisis and the negative impact thereof on the regional productive system, of the severe difficulties crossed by many companies, the risks of serious losses in terms of employment and skills in the productive regional system,

[127] Marche Region, Law 25/2009: Supporting measure for the aquisition of enterprises by worker cooperatives in order to retain jobs

supports new cooperatives promoted mostly by workers who want to acquire the business or areas of activity of the company in which they worked for the purpose of safeguarding employment". The business transfer takes place for example through grants for technical assistance, mentoring and training of workers and interest-free loans to support start-up phases.

Finally, we are witnessing the spread of funding for so called "Youth" cooperatives. These regional calls provide incentives for the creation of new cooperatives whose members must be in varying percentages (usually at least 50%) aged between 18 and 40 years and reside in the region financing the fund[128]. Other examples supporting youth employment include regional incentives for cooperatives hiring (with long-term contracts) unemployed young people. The incentive can take many forms, but usually consists in a form of salary integration (not exceeding 50% of the gross cost of 12 months following the recruitment) for each new employee[129]. Other measures range from incentives for investments in environmental protection to investments for modernization and technological innovation[130].

Other measures in support of cooperatives

In addition to public measures thus far analyzed, other forms of support for cooperatives are set-up by the cooperative world.

Law No. 59 of 31 January 1992, art. 11 par.4 provides that cooperatives and their consortia, which are adherent to the national associations representing cooperatives, shall allocate 3% of annual total profits to the establishment and increasing of a fund established by these associations. Each federation has thus created a fund for the promotion and support of cooperatives. Legacoop, Confcooperative and AGCI, the 3 major national confederations, have respectively founded Coopfond, Fondosviluppo spa and General Fond spa. These companies manage the fund established by the law; they are 100% owned by the respective federations although, legally, they are separate entities.

In addition to this fund, the 3 Confederations, together with the major Italian unions (CGIL, CISL and UIL), set up FON.COOP in 2002, whose mission is to promote ongoing training by contributing to company and individual training plans.

The confederations individually have created funds, banks, associations and research centers to develop their activities of promotion and support to cooperatives (e.g. AGCI: Isicoop - Institute for the study of Cooperative Company, Consef - Consortium for Financial Services, AGCI Bank - a limited company bank whose capital is owned mostly by cooperatives adherent to the Association).

[128] Veneto Region decrees n. 2096 e 2097, 7 july 2009 : support to young and women entrepreuenerships; Calabria Region, decree 17 december 2009 n. 23263; Sicilia Region, decree 1 december 2009 n. 2055
[129] Puglia Region, decree 11 september 2009 n. 472.
[130] Campania Region, decree 6 august 2009 n. 728; Liguria Region, decree 10 july 2009 n. 934; Sardegna Region, decree 20 july 2009 n.11122; Piemonte Region, decree 24 july 2009 n. 181.

The regional sections of the 3 confederations manage funds and measures for cooperatives having their registered office in the same region (e.g. Consorzio Umbria Fidi di Legacoop Umbria, COOPERFIDI).

Other Consortia, not directly linked with the 3 major confederations, support the development of cooperatives. For instance the CCFS (Consorzio Cooperativo Finanziario per lo Sviluppo) which aims to promote the development of the member companies and to cooperate and participate in the development and consolidation of the cooperative movement, encouraging the creation of new cooperatives or companies in which they are shareholders participate through access to credit for members, giving guarantees in their favour, granting loans, and giving financial advice.

New trends and best practices

The cooperative model in Italy, initially developed around some traditional sectors (agriculture, banking and consumer sector), is now so large that it covers almost the entire spectrum of activities. The most important sectors, both economically and by size, are: agriculture, banking, consumer and distribution, and social care. In addition to these well-established and consolidated sectors, we now see a new experience in some areas thanks to innovative financing measures designed with a new business development perspective.

Specific measures are financed by European funds. In particular, with reference to the Trentino Region, we have: in the framework of the EQUAL project (created under the European Employment Strategy and co-financed by European Social Fund for 2000-2006 and which aims to promote innovative approaches and policies to combat discrimination and inequality in the labor market) innovative experiences have been experimented and are now consolidated. Some of them were managed by Issan (Istituto Studi Sviluppo Aziende Nonprofit). One of these is PromoCare, which was aimed at the employment of immigrant women in treatment services by facilitating their integration into the labour market overcoming the idea of charitable social services currently in place and promoting the development of innovative and entrepreneurial forms able to sustain themselves and to ensure a qualified and continuous support to families. A product of this project is the Consortium PromoCare that connects the key actors operating in immigration and personal care services (www.promocare.com). Another product of the Project Equal Restore is the restructuring of the Convent of Terzolas. This structure has been the incubator for a new strategy of development that guarantees economic sustainability while safeguarding its social and spiritual function.

The joint effort of several local actors led to the establishment of SolValley, a social cooperative, which administers the Convent of Terzolas as a place of welcome and training for inhabitants. In addition, the administration of the hotel and the agricultural activities realized around the monastery give the possibility of offering job opportunities to disadvantaged people. The last example is that of a cooperative that employs foreign women offering ethnic catering services.

Education and training

Education and training on cooperatives is managed by different actors at different levels.

Universities offer some courses on cooperatives, such as “Economy and management of cooperative enterprises and non-profit organizations” at the university of Bologna. Other degrees are dedicated to the third sector in general, with modules especially dedicated to cooperatives. Further, there are modules on law or management of cooperatives within general courses such as law, social sciences and economics.

Concerning postgraduate education, several degrees have been activated for 2009/2010. These have the same distinctions we analyzed for University degrees.

There are courses and Masters on cooperative law: Master in Administration and Management of Cooperative Enterprises (University of Florence); Master's Degree in Economics and Management of Cooperative Enterprises (University of Roma3); First Level Master's Degree in Economy and Cooperation (University of Bologna); Master in Management of Cooperative enterprise (University of Mantova); Master in management of cooperatives and social enterprises (Consorzio Koinòn).

There are courses on Third Sector and non-profit organizations with modules dedicated to the cooperative law: Master in Management of Social Enterprises, Non Profit and Cooperatives (Bocconi Milan); Management of social enterprises (University of Trento); Master in Management of Third Sector Organisations (Angelicum-Pontificia Università S. Tommaso d'Aquino); Master in “Diritto degli Enti Non Profit per lo Sviluppo del Territorio e la Cooperazione Internazionale” (University of Salento); Master "Working in the non-profit sector (University of Urbino); Master “Economie Sociali, Imprese Sociali e Sviluppo Locale” (University of Napoli Federico II); AEGIS – Management of social enterprises (Consorzio Universitario Pordenone).

Training courses are usually organized by national and local Federations of cooperatives (i.e. LegaCoop, AGCI, ConfCooperative) and by public (regions) and private organizations, which aim at promoting the principles and values of mutuality, deepening the study, and disseminating knowledge on cooperative entrepreneurship.

We mention here: the Italian Institute on cooperative studies “Luigi Luzzatti”, under the supervision of the Ministry for Economic Development, which promotes and fosters historical, economic, social and legal studies on cooperatives; offers scholarships to researchers on these fields and organises training courses and seminars in collaboration with the main Italian Universities. It also has a library which contains about 4.000 Italian and international books and reviews and the catalogue can be consulted online; AICCON (Associazione Italiana per la promozione della Cultura della Cooperazione e del Non Profit), which organises training courses, seminars, and conferences on cooperative and non profit sector. In 1999 AICCON founded the first Italian school devoted to fundraising studies: the Fund Raising School.

Among the main areas of training there are courses for managers of cooperatives and/or social enterprises and courses for auditors. On this subject, besides training organized by cooperatives' Federations in collaboration with the Order of Accountants and Business Consultants, other trainings are also organized, often in the form of seminars, by other entities such as ARCES (Italian Association of Certified Public Accountants of the Social Economy), UNICOOP (Italian Union of Cooperatives), AICCON, and Italian Universities (Tor Vergata - Rome, University of Florence).

Finally, there are handbooks, commentaries and books, both academic and professional, on cooperatives. Academic monographs on cooperative law do exist in a relevant number. All handbooks on company or commercial law contain a chapter or section on cooperatives. There are reviews entirely dedicated to cooperatives and the major reviews on company or commercial law do deal with cooperatives as well.

LATVIA

By Sergejs Sidorko

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Latvian legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. –**2.** Representative organisations of the cooperative movement. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.4.1.** Membership. – **3.4.2.** Membership requirements. – **3.4.3.** Investor share-holders. – **3.4.4.** The rules on the admission of new members. – **3.5.** Financial profiles. – **3.5.1.** Minimum capital requirement for the establishment of a cooperative. – **3.5.2.** Rules on the allocation of profits and devolution of assets. – **3.5.3.** Compulsory reserves. – **3.5.4.** The treatment of patronage refunds. – **3.5.5.** Ability to issue financial instruments. – **3.5.6.** Obligation for a cooperative to provide public financial statements and balance sheets. – **3.6.** Organisational profiles. – **3.6.1.** Structure of a cooperative. – **3.6.2.** Voting rights in the general assembly. – **3.6.3.** Rules on the formation of the management body. – **3.7.** Registration and control. – **3.8.** External control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **4** The SCE Regulation and national law on cooperatives. – **5** Essential bibliography.

1. The implementation of SCE Regulation 1435/2003 in Latvian legislation

1.1. Source, time and modes of implementation

To ensure the implementation of Regulation 1435/2003, the following laws were accepted:

- **Law of European Cooperative Society** effective from 23.11.2006 (likums "Eiropas kooperatīvo sabiedrību likums", "Latvijas Vēstnesis",180 (3548), 09.11.2006).
- **Law On the Involvement of Employees in a European Cooperative** effective from when it entered into force on 29/11/2006; lapsed 24/02/2010. (likums Par darbinieku iesaistīšanos Eiropas kooperatīvajā sabiedrībā, "Latvijas Vēstnesis", 183 (3551), 15.11.2006; English version www.likumi.lv).
- **Law On the Involvement of Employees in decision-making in European commercial company, the cooperative society and cross combination** effective from when it entered into force 24.02.2010. (likums "Par darbinieku iesaistīšanu lēmumu pieņemšanā Eiropas komercsabiedrībā, Eiropas kooperatīvajā sabiedrībā un kapitālsabiedrību pārrobežu apvienošanas gadījumā", "Latvijas Vēstnesis", 23 (4215), 10.02.2010).

1.2. Structure and main contents of the regulation

European Cooperative Society Law from 23.11.2006 concise and does not contain any articles that restrict the implementation of SCEs in the territory of Latvia.

The **Law About employee involvement in decision-making in European commercial company, the cooperative society and cross combination**, adopted on 24.02.2010 entered into force and replaced pre-existing law about **Involvement of Employees in a European Cooperative Society.**

We compared the laws. One - of - 29.11.2006 - **Law On the Involvement of Employees in a European Cooperative Society** of 24.02.2010 with the **Law About employee involvement in decision-making European commercial company, the cooperative society and the cross combination**. As a result of line-item comparison found in the Act of 24.02.2010 on the terms and conditions, involvement of employees in a European Cooperative was fully preserved and there were no new requirements and significant differences from the law of 29.11.2006. Version of the new law in English translation is not available but the old version of the law is fully suitable for assessing the situation.

1.3.The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

In accordance with the requirements of article 78, paragraph 2 of Regulation 1435/2003 in Latvia identified the responsible agencies:

- **State Register of enterprises** checks merger acts and formalities, legality of the merger and the completion of the cooperative society in establishing the validity of the registered office of the transfer of actions and formalities for the legality of the activities and completion of formalities to be accomplished before the transfer of registered office (**European Cooperative Society Law** ,Chapter II. 5th Article. (3) (4)).
- **Financial and Capital Market Commission, the State Revenue Service and the Ministry of Economy** give consent for cooperative company mergers (**European Cooperative Society Law** Chapter II Section 5. (4)), may object to the participation of a cooperative society registered in Latvia in the SCE (**European Cooperative Society Law** Chapter II, Section 6. (1))

The requirements of Article 7 of Regulation 1435/2003 considered European Cooperative Society Law in:

Chapter III. European Cooperative Society transfer of registered office to another Member State,

Section 8. News Submission to Registry of Enterprises, if the registered office of the Latvian is transferred to another;

Section 9. Creditor protection measures;

Section 10. National authorities have jurisdiction in the case of a European Cooperative Society registered office of the Latvian transferred to another Member state;

The requirements of Article 21 of Regulation 1435/2003 considered European Cooperative Society Law in:

Chapter II. European Cooperative Society Formation and Registration, Section 6. National authorities have the competence of cooperative society mergers; (1) In accordance with Article 21 of Regulation Nr.1435/2003 Latvian registered cooperative society in the formation of cooperative society in accordance with its competence may object to the Financial and Capital Market Commission, the State Revenue Service and the Ministry of Economic Affairs.

The requirements of Article 29, 30 of Regulation Nr.1435/2003 considered European Cooperative Society Law in:

Chapter II. European Cooperative Society Formation and Registration, Section 5. Cooperative societies in the merger order sections (3) (4), (5) (6)

The requirements of Article 54, 73 of Regulation *Nr.1435/2003* considered European Cooperative Society Law in:

Chapter VI. European cooperative society members' meetings and the cooperative company liquidation

Section 15. European Cooperative Society general meeting of members

Section 16. European Cooperative Society Liquidation

2. Representative organisations of the cooperative movement

Latvian agricultural cooperatives Association (55 coops members) established 2002

Latvian Association of Flat Owners' Cooperatives (35 coops members) established 1998

Legislators have taken all necessary measures to implement (implementation) Regulation 1435/2003

In the State Register of Enterprises of Latvia have been no SCE.

In Latvia, there is no reward incentives to create SCE.

Form SCE has not yet received a distribution in Latvia for the following reasons:

1) Cooperative as a form of business organization in Latvia is not popular.
2) The cooperative sector is underdeveloped and weak, there are no cooperatives producing any products;
3) In Latvia, the presence of cooperatives markedly in the following sectors:
   i. Management of apartment ownership (Latvia is an analogue of condominiums in Europe) – to 1000 cooperatives (Association of Flat Owners' Cooperatives -35 coops members);
   ii. Credit Society - 36 cooperatives;

iii. agricultural service cooperatives - 63 (agricultural service cooperatives association members 55).

There are cooperatives in other industries, but their numbers are insignificant and economically they are weak.

4) The specific areas of activity of these cooperatives is such that their activity in the establishment or participation SCE is unlikely because:

i. The main task of apartment ownership cooperative societies is management and maintenance of apartment ownership of its members, and members may be only the owners of apartment buildings that are served by the cooperative;
ii. Credit cooperatives societies established on a territorial basis and members may be individuals and trade unions, association of several Credit cooperatives societies as a union of legal entities to local laws in force is not provided;
iii. agricultural service cooperatives is an association of several individual producers of agricultural products (mainly grains and milk) with the aim of unified efforts to implement the product and nothing more.

5) For interview I contacted two biggest national associations: the Latvian agricultural cooperatives Association (55 coops members) director Linda Bille and the Latvian Association of Flat Owners' Cooperatives (35 coops members) Chairman of the board Valters Kaganis and the biggest Credit cooperative society "Dzelzceļnieks KS" (12.000 persons members) Chairman of the board Olga Kazachkova

Interviewees Linda Bille and Olga Kazachkova consider that in future their branch cooperative societies may be interested in set up of SCE, Valters Kaganis consider that Flat Owners' Cooperatives is not interested in SCE set up.

Interviewees have been stressed with absence of methodical materials about SCE set up procedure.

It is necessary to have methodical materials on SCE regulation written accessible not legal language. There is a strong need for public information about the possibilities of the SCE regulation.

It is necessary to have the information on potential partners.

3.Overview of national cooperative law

3.1.Sources and legislation features

Latvia has a general law for cooperatives. **Cooperative Societies Law** effective from 23.11.2006**.** (Kooperatīvo sabiedrību likums, Latvijas Vestnesis, 48/49(1109/1110), 24.02.1998; English version www.likumi.lv)

3.2. Definition and aim of cooperatives

Cooperative Societies Law says: Chapter I. Section 1.

"5) cooperative society — a voluntary association of natural persons and legal persons the aim of which is to provide services in order to increase the effectiveness of the commercial activity of its members"

Section 4. Legal Status of Cooperative Societies

(1) A cooperative society is a legal person.

Section 6. Merchant Status of Cooperative Societies

A cooperative society shall be a merchant, except for agricultural services cooperative societies, cooperative societies of apartment owners, cooperative societies of vehicle garage owners, cooperative societies of boat garage owners and horticultural cooperative societies."

Chapter IV. Equity Capital and Commercial activity of Cooperative Societies

Section 24. Equity Capital of Cooperative Societies

"(1) The equity capital of a cooperative society shall be material and money resources, which are formed by the sum of cooperative share values of all members of the society. The equity capital shall be variable."

Credit Unions Act [effective from 01.01.2002 (Krājaizdevu sabiedrību likums**,** Latvijas Vestnesis, 60 (2447), 18.04.2001)] says: Chapter I. Section 2.

"(1) Credit Unions is a cooperative company with variable capital and the number of members in accordance with this Law and its Statute provides that members of the public following financial services:"

3.3. Activity

Cooperatives have the right to engage in any commercial activity permitted.

Cooperative Societies Law says: Chapter I .Section 6.

"Cooperatives have the right to engage in any commercial activity permitted by the Commercial Law without any limits." (Commercial Law effective from 01.01.2002; [Komerclikums "Latvijas Vēstnesis", 158/160 (2069/2071), 04.05.2000]; English version www.likumi.lv)

Credit Union Act says**:** Chapter II. Section 9.

"(1) credit unions a special permit (license) issued policy, as well as a credit union activities related to the restrictions of the Financial and Capital Market Commission."

Cooperative Societies Law says: Chapter I .Section 6.

"A cooperative society shall be a merchant, except for agricultural services cooperative societies, cooperative societies of apartment owners, cooperative societies

of vehicle garage owners, cooperative societies of boat garage owners and horticultural cooperative societies."

However, the special status agricultural services cooperative societies, cooperative societies of apartment owners, cooperative societies of vehicle garage owners, cooperative societies of boat garage owners and horticultural cooperative societies determined by the fact that the main purpose of these cooperatives is to meet the needs of its members rather than profit. And this feature is specified in:

Law On Enterprise Income Tax effective from 01.04.1995 [Par uzņēmumu ienākuma nodokli; "Latvijas Vēstnesis", 32 (315), 01.03.1995.], Section 2. Tax Payers

"(2). Enterprise income tax shall not be paid by:

(3) Partnerships, agricultural services cooperative societies, apartment owner's cooperative societies, motor vehicle garage owner's cooperative societies, boat garage owner's cooperative societies and horticultural cooperative societies shall not pay enterprise income tax independently. Each partnership member shall pay the relevant personal income tax or enterprise income tax according to the share of taxable income of the partnership due to him or her, but a member of an agricultural services cooperative society – for the share of the agricultural services cooperative society surplus allocated to him or her, and for their part members of an apartment owner's cooperative society, motor vehicle garage owner's cooperative society, boat garage owner's cooperative society or horticultural cooperative society – for his or her share of the distributed profit."

In addition to the basic law of economic activity of cooperatives are regulated by:

- Credit Union cooperative according to the **Credit Unions Act**

- Apartment owner's cooperative societies according to the law **On Residential Property** effective from 26.10.1995[likums "Par dzīvokļa īpašumu", "Latvijas Vēstnesis", 157 (440), 12.10.1995.]

3.4. Forms and modes of setting up

3.4.1. Membership

Minimum number of members - 3

Minimum number of members - 20 in case of the Credit Unions

Cooperative Societies Law says: Chapter II. Section8.

"(1) A cooperative society may be founded by natural persons or legal persons. A legal person shall be represented at a cooperative society by its authorised representative.

(2) The founders of a cooperative society shall be the persons who have signed the memorandum of association of the co-operative society and its articles of association, as well as made the investment provided for in the memorandum of association and made

other payments prescribed by the memorandum of association. The founders of the cooperative society shall become members thereof at the moment when the society is registered in the Enterprise Register.

(4) The number of the founders of a cooperative society may not be less than three."

Section 9.

"A cooperative society may be founded as a new society or by reorganising an already existing commercial company in accordance with the procedures specified in Sections 10-16 of this Law."

Credit Unions Act says: Chapter II. Section 8.

"1) A credit union founders may be no less than 20 persons who meet the requirements set in article 5 of the Law."

3.4.2. Membership requirements

Cooperative Societies Law says: Chapter III. Section 17.

"(1) Members of a cooperative society may be persons who utilise the services of the society, recognise and comply with the articles of association of the society and have made an investment in the equity capital of the society in accordance with the procedures specified in its articles of association, as well as make other payments provided for in the articles of association and decisions of the society.

(2) A natural person may become a member of a cooperative society when he or she has reached the age of 16 years, except for a cooperative society of apartment owners where an apartment owner may become its member without reaching such age. Up to his or her acquisition of the full capacity to act the interests of such a person in the society shall be represented in accordance with the procedures set out in the Civil Law. A person may become a member of the council, board of directors or audit commission of the cooperative society only following reaching the age of 18 years.

(3) With the consent of parents and guardians also a person who has not reached the age of 12 years may be a member of a pupils' cooperative society.

(6) The members of a cooperative society of apartment owners may only be those natural persons and legal persons who are the owners of apartments, non-living premises or artists' studios in a house (houses) which are administered and managed by the relevant cooperative society. The joint owners of a separate residential property shall be represented in the cooperative society by one of the joint owners, by mutual agreement on the basis of a written authorisation.

(7) The founders or members of a horticultural cooperative society may only be such natural persons and legal persons to whom land has been allocated for use or who have land in ownership within the territory managed by the cooperative society.

(8) The members of an agricultural services cooperative society may be natural persons or legal persons who are engaged in production of agricultural products on their holding and who utilise the services of the agricultural services cooperative society in compliance with the requirements of the articles of association."

Credit Unions Act says: Chapter I. Section 5.

"(1) For a single credit union members may be adults capable natural persons, either living within the territory of the municipality or the property owners, or take up employment or commercial activity in the area. Credit union member may also be the municipality where the population is the credit union members. Populated rural areas may form a single credit unions, if several adjacent municipalities have concluded an appropriate cooperation

(2) one-credit union members may to be adults capable natural persons who are employed by the same employer agreement.

(3) One-credit union members may to be adults capable natural persons of one corporation (professional associations) or the professional creative community organizations or trade unions, public organizations or sports participants. Such credit unions may also be a member of the public or professional organization.
(4) Credit Unions statutes may provide that its members may also become members already enrolled spouses.

(5) One-credit union members may have a corporation whose members are natural persons, or agricultural service cooperative societies, where one or more credit union members belong to more than 50 percent of the voting rights of such company's share capital.
(6) Members mentioned in the fifth paragraph this section - legal entities – have non-rights–to votes in savings and loan societies."

3.4.3. Investor share-holders

Cooperative Societies Law says: Chapter I. Section 1.

"10) additional cooperative share — a cooperative share, which grants to a cooperative society member the right to receive a dividend and profit refund, but does not grant voting rights;"

3.4.4.The rules on the admission of new members

Cooperative Societies Law says :

Chapter III. Section 18.

"(1) A person who wishes to join a cooperative society and become a member thereof shall submit to the board of directors of the cooperative society a written application, make

the payments related to joining in accordance with the procedures and in the amount set out in the articles of association, as well as make contributions to the equity capital of the society and provide the necessary information.

(2) The board of directors shall examine the written application regarding joining the co-operative society within three months of the date it was submitted. Decisions of the board of directors regarding the admission of new members shall be approved by the general meeting of members (meeting of authorised persons).

(3) No person may be refused admission to a cooperative society, unless the person has been excluded from the cooperative society due to violation of the articles of association of the society. Only those cooperative societies which in compliance with the articles of association service their own members and cannot successfully service a greater number of members may refuse to admit new members.

3.5. Financial profiles

3.5.1.Minimum capital requirement for the establishment of a cooperative

The equity capital shall be variable**.** (Co-operative Societies Law Chapter IV. Section 24.(1))

The minimum amount of the equity capital of a cooperative society shall be 2000 lats (2849 Euro). (Chapter IV. Section 24.(3))

The minimum amount of the equity capital of cooperative societies of apartment owners, cooperative societies of vehicle garage owners, cooperative societies of boat garage owners, agricultural services cooperative societies, horticultural cooperative societies and amelioration cooperative societies shall be 200 lats (285 Euro). (Chapter IV. Section 24.(3))

Cooperative Societies Law says: Chapter IV. Section 24.

“(1) The equity capital of a cooperative society shall be material and money resources, which are formed by the sum of cooperative share values of all members of the society. The equity capital shall be variable.

(2) The equity capital of a cooperative society shall increase or decrease depending on the number of cooperative shares and the face value of cooperative shares, as well as on the changes in the face value of cooperative shares introduced in accordance with the procedures specified in the articles of association.

(3) The minimum amount of the equity capital of a cooperative society shall be 2000 lats. The minimum amount of the equity capital of cooperative societies of apartment owners, cooperative societies of vehicle garage owners, cooperative societies of boat garage owners, agricultural services cooperative societies, horticultural cooperative

societies and amelioration cooperative societies shall be 200 lats. If the equity capital decreases and is less than the minimum amount specified in the articles of association, the board of directors shall, within a period of three months, convene the general meeting of members (meeting of authorised persons) in which the further activities of the society shall be decided."

Credit Unions Act says: Chapter V. Section 20.

"(1) Credit Unions equity ratio of assets and off-balance sheet total (capital adequacy) shall not be less than 10 percent."

3.5.2.Rules on the allocation of profits and devolution of assets

Cooperative Societies Law says: Chapter IV. Section 34

"(1) By a decision of the general meeting of members (meeting of authorised persons) the profit remaining following the payment of taxes and making of other mandatory payments shall be distributed as follows:

1) for the formation of the reserve capital specified in the articles of association, as well as other capital;

2) for the payment of dividends for cooperative shares in accordance with the procedures prescribed by the articles of association; and

3) for profit refund in accordance with the procedures prescribed by the articles of association.

(2) The remaining part of the profit shall be distributed in accordance with the decision by the general meeting of members (meeting of authorised persons)."

3.5.3.Compulsory reserves

Cooperative Societies Law says: Chapter IV. Section 31

"(1) A cooperative society shall create a reserve capital, which by a decision of the general meeting of members (meeting of authorised persons) shall be utilised to cover the losses of the society.

(2) The reserve capital shall consist of:

1) the joining fee if such is provided for in the articles of association of the cooperative society;

2) unclaimed dividends (in an agricultural services co-operative society — surplus) and cooperative shares; and

3) donations and other unexpected income.

(3) The maximum amount of the reserve capital shall not be limited."

Credit Unions Act says: Chapter III. Section 20.

" (1) Credit Unions community consists of spare capital, including at least 25 percent of the annual net profit (profit after tax) to reserve capital of at least 10 percent of total assets."

3.5.4.The treatment of patronage refunds (i.e., user-member ex post remuneration)

Cooperative Societies Law says: Chapter III. Section 22

"3) to utilise the preferences and advantages provided for the society member;

4) to act with his or her cooperative shares in accordance with the procedures set out in this Law and the articles of association of the society;

5) to receive a dividend and profit refund or surplus (in an agricultural services cooperative society) in the amount and in accordance with the procedures set out in the articles of association of the society;"

3.5.5. Ability to issue financial instruments

Cooperative Societies Law says: Chapter I Section 1.

"10) additional cooperative share — a cooperative share, which grants to a cooperative society member the right to receive a dividend and profit refund, but does not grant voting rights".

Chapter IV. Section 32

"In accordance with the procedures specified in the articles of association a cooperative society may also create other capital."

3.5.6.Obligation for a cooperative to provide public financial statements and balance sheets

According to law **About the Company Annual Reports** effective from 01.01.1993 [likums "Par uzņēmumu gada pārskatiem", "Latvijas Vēstnesis", (Ziņotājs, 44, 12.11.1992.)] cooperatives are obliged to provide annual financial reports which are audited and approved at a general meeting, register them in State Revenue Service, and send to the Enterprise Register of the Republic of Latvia. The Enterprise Register of the Republic of Latvia publishes these documents.

3.6.Organisational profiles

3.6.1. Structure of a cooperative

Cooperative Societies Law says: Chapter V. Section 37

"(1) The management functions of a cooperative society within the framework of its competence shall be performed by the general meeting of members (meeting of authorised persons), the council and the board of directors. The functions of the board of directors in accordance with the procedures set out in the articles of association of the society may be performed by the director or the manager.

(2) The articles of association of the society may provide not that a general meeting of members shall be convened, but rather a meeting of authorised persons and specifying the representation norm of the authorised persons and procedures for their election. In a cooperative society of apartment owners which has more than 200 members, the meeting of authorised persons may only be convened in between the general meetings of the cooperative society.

(3) The control and audit institution of a cooperative society shall be the audit commission (auditor) or the sworn auditor.

(4) In accordance with the procedures specified in the articles of association of the society a council of the cooperative society may be created but, if the council is not created, its functions shall be performed by a general meeting of members (meeting of authorised persons)."

Credit Unions Act says: Chapter V. Section 22.

"(1)Credit Unions its statutory procedures specified and set up a credit committee."

3.6.2.Voting rights in the general assembly

Cooperative Societies Law says: Chapter V. Section 40

"(1) In a general meeting (meeting of authorised persons) each member of the cooperative society irrespective of the number of the basic cooperative shares owned by him or her shall have one vote.

(2) A member cannot transfer his or her voting rights to another person if the articles of association of the cooperative society do not provide for special authorisation procedures."

3.6.3.Rules on the formation of the management body

Cooperative Societies Law says: Chapter V. Section 39

"(1) The general meeting of the members of a cooperative society alone has the right to:

1) elect and recall the authorised persons who at the meeting of authorised persons are entitled to decide the issues within the competence of the members specified in Paragraph two of this Section;

2) elect and recall members of the board of directors and council, members of the audit commission (auditor) or the sworn auditor and members of the liquidation commission;

3) specify the amount of remuneration for the members of the board of directors and council, members of the audit commission (auditor) or the sworn auditor and members of the liquidation commission; and

4) specify changes in the rights of representation of the members of the board of directors."

3.7.Registration and control

Cooperative Societies Law says: Chapter II. Section 16

"(1) Following the election of the management and audit institutions of a cooperative society, the founders shall transfer the property invested in the cooperative society, all documents, obligations and rights related to the founding to the board of directors by a deed of acceptance and transfer.

(2) Within 15 days following the founding meeting, the executive body of the cooperative society or the person authorised by the founding meeting shall submit to the Enterprise Register the registration application of the relevant cooperative society and the following documents:

1) the memorandum of association of the cooperative society;

2) the articles of association;

3) the minutes of the founding meeting;

4) a bank statement regarding the payment of the equity capital (if the equity capital or a part thereof is paid in cash), as well as the documents certifying the value of each property contribution (if property contribution is made);

6) other documents in accordance with the Law on the Enterprise Register of the Republic of Latvia.

(3) The amount of the equity capital at the moment of registration of a cooperative society shall be determined by the sum of the values of the invested cooperative shares.

(4) The Cabinet shall specify the documents, which shall be submitted to the Enterprise Register in order to register an agricultural services cooperative society, as well as the procedures for the recognition of such a society."

3.8.External control

There are no special forms of external control over the activities of cooperatives, except Credit Union. **Credit Union Act** says: Chapter IV. Section 24 "(1) To ensure that credit unions safe, stability and development of credit unions supervised by the Financial and Capital Market Commission, in accordance with this Law and other laws and regulations."

3.9.Transformation and conversion

Cooperative Societies Law says: Chapter V. Section 39

"(2) The general meeting of members (the meeting of authorised persons) has the right to:

7) decide matters related to the reorganisation or liquidation of the society, as well as to participation in other commercial companies or withdrawal therefrom;

8) decide regarding the founding, reorganisation or liquidation of commercial companies;"

The Commercial Law **says: Part C .Division XV .Section 334.**

"(1) A commercial company (hereinafter in this Part – company) may be reorganised by way of merging, division or restructuring.

(2) Companies involved in the reorganisation process may be companies of the same type or various types if the law does not specify otherwise."

The Commercial Law resolves:

Section 335. Merging of Companies
Section 335.[1] Cross-border Merger
Section 336. Division of Companies
Section 337. Restructuring of Companies

3.10. Specific tax treatment

In Latvia cooperatives are under usual tax law.

4.The SCE Regulation and national law on cooperatives

1)There is in Latvia a fully developed legal framework, so to the territory of our country without any limit were created SCE, Latvian cooperatives were free to participate in SCE in other countries. National laws harmonized with SCE Regulation 1435/2003.

2)At the core of its national legislation on cooperatives allows us to implement any form of cooperation and successful work in all sectors.

3)The current lack of activity in the creation of SCE in our country was primarily due to the fact that the cooperative sector is not developed, as I reported above.

4) There is no information about partners interested in creating SCE. The establishment of an information resource where partners can find each other would stimulate the process of creating SCE.

5) It is necessary to have methodical materials on SCE regulation written accessibly, not in legal language. There is a strong need for public information about the possibilities of the SCE regulation.

6)20.06.2002. was adopted a Law "Amendments to the Cooperative Societies Act" ("LV", 104 (2679), 10.07.2002.) [effective from 24.07.2002.].

These changes made a negative influence:

-Was excluded from the law main part of ICA principles,

-Was changed the main aim of cooperation from ICA declaration to "forced job capacity"

-Was excluded chapter about workers' share before was possible to each worker during job time in coop to be a member due to special kind of share.

-Was reduced possibility for big cooperatives to use institution of the authorised persons for annual meetings and decision-making (for example my coop 1450 members before 2002 it was possible that each 15 members have possibility to elect 1 for participation in annual meeting, therefore in annual meeting was represented main part of members)

-From 2005 August cooperative cannot be a nonprofit organization.

5.Essential bibliography

Law of European Cooperative Society effective from 23.11.2006 (likums "Eiropas kooperatīvo sabiedrību likums", "Latvijas Vēstnesis",180 (3548), 09.11.2006)

Law On the Involvement of Employees in a European Cooperative effective from when it entered into force. 29/11/2006; lapsed 24/02/2010.(likums Par darbinieku iesaistīšanos Eiropas kooperatīvajā sabiedrībā, "Latvijas Vēstnesis",183 (3551), 15.11.2006; English version www.likumi.lv)

Law On the Involvement of Employees in decision-making in European commercial company, the cooperative society and cross combination effective from when it entered into force 24.02.2010. (likums "Par darbinieku iesaistīšanu lēmumu pieņemšanā Eiropas komercsabiedrībā, Eiropas kooperatīvajā sabiedrībā un kapitālsabiedrību pārrobežu apvienošanas gadījumā", "Latvijas Vēstnesis", 23 (4215), 10.02.2010.)

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Law On Enterprise Income Tax effective from 01.04.1995 [Par uzņēmumu ienākuma nodokli,; "Latvijas Vēstnesis",32 (315), 01.03.1995.],]; (English version www.likumi.lv)

The law On Residential Property effective from 26.10.1995[likums "Par dzīvokļa īpašumu", "Latvijas Vēstnesis", 157 (440), 12.10.1995.]; (English version www.likumi.lv)

The law About the Company Annual Reports effective from 01.01.1993 [likums "Par uzņēmumu gada pārskatiem", "Latvijas Vēstnesis", (Ziņotājs, 44, 12.11.1992.)]

Law in attachment:

Law of European Cooperative Society effective from 23.11.2006 (Latvian language)

Law of European Cooperative Society (English language translated by Beata Berzina)

Law On the Involvement of Employees in a European Cooperative effective from when it entered into force. 29/11/2006; lapsed 24/02/2010 (Latvian language)

Law On the Involvement of Employees in a European Cooperative effective from when it entered into force. 29/11/2006; lapsed 24/02/2010 (English language official translation)

Law On the Involvement of Employees in decision-making in European commercial company, the cooperative society and cross combination effective from when it entered into force 24.02.2010 (Latvian language)

Cooperative Societies Law effective from 23.11.2006. (Latvian language)

Cooperative Societies Law effective from 23.11.2006. (English language official translation +*with amending laws of*: 27.10.2006, 14.11.2007, 14.07.2009)

Commercial Law effective from 01.01.2002(Latvian language)

Commercial Law effective from 01.01.2002(English language official translation)

Credit Unions Act effective from 01.01.2002(Latvian language)

Law On Enterprise Income Tax effective from 01.04.1995(Latvian language)

Law On Enterprise Income Tax effective from 01.04.1995(English language official translation)

The law On Residential Property effective from 26.10.1995(Latvian language)

The law On Residential Property effective from 26.10.1995(English language official translation)

The law About the Company Annual Reports effective from 01.01.1993(Latvian language)

LIECHTENSTEIN

By Wilfried Marxer

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Liechtenstein's legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Liechtenstein's legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Liechtenstein's legislation

1.1. Source, time and modes of implementation

The implementation of SCE Regulation 1435/2003 in Liechtenstein is done by:

- *Gesetz vom 22. Juni 2007 über das Statut der Europäischen Genossenschaft (Societas Cooperative Europea, SCE) (SCE-Gesetz; SCEG), LGBl. 2007 Nr. 229* [SCE-Law of 22 June 2007 on the SCE Statute];
- *Gesetz vom 22. Juni 2007 über die Beteiligung der Arbeitnehmer in der Europäischen Genossenschaft (SCE-Beteiligungsgesetz; SCEBG), LGBl. 2007 Nr. 230* [SCE-Law of 22 June 2007 on the co-operation of employees].

In addition to the laws there exists a leaflet in inscriptions of SCEs with Liechtenstein domicile as a help for interested natural and juristic persons and the administration:

- *Merkblatt zur Neueintragung einer Europäischen Genossenschaft (Societas Cooperativa Europea, SCE) mit Sitz in Liechtenstein* [Leaflet on Inscriptions of SCEs with Liechtenstein domicile]

1.2. Structure and main contents of the regulation

The above mentioned Liechtenstein SCE-Laws Nr. 229/2007 and 230/2007 are separate laws dealing explicitly with SCEs. Law Nr. 229 (SCE Statute) consists of 44 Paragraphs, Law Nr. 230 (Co-operation of employees) contains 56 Paragraphs.

Law Nr. 229 follows the main purpose to implement the EG directive (EG) Nr. 1435/2003 of 22 July 2003 on the Statute of SCEs.

Law Nr. 230 refers to directive 2003/72/EG Council of 22 July 2003, an amendment to the Statute of SCEs concerning co-operation of employees.

The main chapters of Law Nr. 229 (SCE Statute) are:

- *Purpose, terminology, domicile;*
- *Application, registration, publication;*
- *Foundation of an SCE (different methods);*
- *Constitution of an SCE (dualistic system, monistic system);*
- *Relocation of domicile across borders;*
- *Closing and liquidation;*
- *Conversion of an existing SCE into a co-operative;*
- *Court of jurisdiction, administrative offense, violation of law.*

The main chapters of Law Nr. 230 (SCE co-operation of employees) are:

- *Purpose, terminology, organs of the employees, rights and duties;*
- *Special negotiation committee;*
- *Agreement on the co-operation of employees;*
- *Cooperation of employees by virtue of the law;*
- *Employee's participation by virtue of the law;*
- *Foundation of an SCE with participation of individuals;*
- *Basic principles of co-operation, protection of employees;*
- *Proceedings.*

There is a minimal capital requirement for the foundation of an SCE which amounts to 30.000 Euro. The capital of an SCE can be registered in Swiss Francs, Euro or US Dollar.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The designated authority for SCEs in Liechtenstein is:

Grundbuch- und Öffentlichkeitsregisteramt des Fürstentums Liechtenstein [Office of land and public registration, Principality of Liechtenstein]

1.4. Essential bibliography

There are no relevant Liechtenstein publications on SCEs so far.

2. A comment on the implementation of the SCE Regulation in Liechtenstein's legislation

There is no doubt that the legal framework for SCEs is implemented in Liechtenstein legislation since the adoption of law nr 229 and 230 in the year 2007 by Liechtenstein parliament. The laws on the Statutes of SCEs and on the cooperation of the employees are separate laws in addition to the formerly and still existing rules concerning cooperatives ("*Genossenschaften*") in the Liechtenstein person and company law. Although the legal framework on SCEs has already been established in 2007, there is only one SCE registered until present. Here is a short description of this SCE.

The only SCE registered in Liechtenstein is called "ALTINA Global Network SCE". It was registered in February 2010. The SCE aims to promote earnings, economy and needs of their members. This is done by:

a) placement of goods and services of the members as well as production and marketing of goods and services of any kind;

b) commercial support of non-profit purposes, economic and ecological cooperation, and cheap acquisitions of any kind;

c) provision of subsidies and loans, especially to finance ecological energy production, protection of climate and environment, and housing and corresponding efficiency measures;

d) investment into housing and efficiency measures, sustainable energy, climate and environment projects, engineering and research, as well as its development, construction, operation and marketing.

e) investment into alternative assets, funds and shares as well as goods, properties and shareholding.

In addition, the SCE can offer its activities to third-parties not being members, do any other business, outsource parts of its activities and found subsidiary companies if this serves the purpose of the SCE directly or indirectly.

The foundation of "ALTINA Global Network SCE" was publicly announced in the Liechtenstein newspapers on 5 March 2010.

There might be different reasons, although not very convincing ones, why the echo on SCE regulations is moderate until present, such as lack of knowledge about this form of corporation, administrative obstacles and more. On the other hand it seems more reasonable that other factors limit the rise of SCEs in Liechtenstein, as far as it can be interpreted from interviews with experts in this field.

Firstly, there is not enough need and attractiveness of the legal form of SCEs compared to other legal forms such as corporations, trusts, foundations or registered associations. For big companies, corporations seem to be the preferred legal form. For smaller units, a starting capital of 30.000 Euros appears to be a pretty high hurdle which is not compensated by an additional value of the specific legal form of an SCE.

There might also be too restricting regulations in SCEs that do not make SCEs attractive enough for profit oriented market actors, for instance regulations concerning rights of employees.

Already existing Liechtenstein corporations, on the other hand, are mainly local, not exercising cross-border activities in different countries. They do not need, therefore, a transformation into an SCE.

Finally Liechtenstein is a very small country in the European context and it is therefore not very likely that the main administration of an SCE is located in Liechtenstein.

The parliamentary debate on Laws no 229/2007 and 230/2007 during the parliamentary sessions, 23 May and 22 June 2007, showed no controversial discussion at all and the laws passed parliament ("*Landtag*") with unanimous approval. At the beginning of the parliamentary discussion it was pointed out that the draft law was elaborated in order to fulfil the tasks originating from EEA-treaty commitment (European Economic Area) to implement EG-regulations.

3. Overview of national cooperative law

3.1. Sources and legislation features

The legal rules on cooperatives in Liechtenstein are part of the person and company law of 20 January 1926:

Personen- und Gesellschaftsrecht vom 20. Januar 1926, LGBl. 1926 Nr. 4 [Person and Company Law of 20 January 1926, LGBl. 1926 Nr. 4].

In this law, the regulations on cooperatives are specifically treated in paragraphs 428 to 495. Though, paragraphs 106 to 245 containing general rules for different kinds of companies are also relevant to cooperatives.

The legal frame is not limited to single types of cooperatives, such as worker, consumer, or social cooperatives.

3.2. Definition and aim of cooperatives

According to the Liechtenstein person and company law, article 428, cooperatives are defined as corporations of an open number of persons or trading companies with the main purpose to promote and secure economic interests of the members by means of common self-help.

3.3. Activity

A cooperative is a legal form to promote the interests of its members. In Liechtenstein traditionally cooperatives have a rural background. Most of the existing cooperatives are dedicated to the common use of land, forests or alps, or they support the marketing of milk and milk products (dairy cooperatives). Some others have cultural or ecological goals and backgrounds.

There is no legal limitation of activities as long as the main purpose and idea of a cooperation to promote the interests of its members is fulfilled.

Theoretically speaking, insurances could also have the legal form of a cooperative. In those cases, of course, the specific rules of controlling insurances would also be applicable to the cooperatives.

3.4. Forms and modes of setting up

The person and company law contains regulations concerning cooperatives which only come into force if there are no statutory regulations which substitute the legal frame. The normal case, however, shows that cooperatives have their own statutes where they are allowed to organize themselves in a pretty free way.

The name of the cooperative must contain "*eingetragene Genossenschaft*" [= "registered cooperative"] or the abbreviation "*eG*" or "*e.Gen*."

The domicile of the cooperative is where the main administration of the cooperative is done, if it is not differently regulated in the statute of the cooperative.

3.5. Membership

The minimum number of members of cooperatives is two, although this is not literally expressed in the person and company law. But since it does not make any sense to found a cooperative with just one member, the minimum requirement is two.

The minimum member of the executive board is two as well.

The cooperatives, as already mentioned, are pretty free in formulating their statutes. This holds also for the question of membership, i.e. who is allowed to be a member, how new members are admitted and so on.

If there are conflicts on these questions, they have to be managed internally, maybe also by taking a case to the court.

3.6. Financial profiles

There is no a legal minimum capital requirement for the establishment of a cooperative. The statute of a cooperative, however, can define specific requirements and financial duties of its members.

There are no binding regulations concerning the allocation of profits and the devolution of assets either.

The statutes of cooperatives, however, must contain regulations concerning different bodies of the cooperative, and they also have to name an auditing body to conduct a regular financial control. If a cooperative develops commercial activities, the regulations are getting stronger, which means that there must be a qualified auditing and that a balance sheet has to be handed in to the tax authority.

3.7. Organisational profiles

There are three legal conditions for the formation of a cooperative:

- a written statute;
- the election of bodies of the cooperative;
- the registration at the office of land and public registration.

As already mentioned, cooperatives are relatively free in shaping their statutes and defining the different bodies and their respective competences. There is no regular, permanent control of the cooperatives by the office of land and public registration. But, the statute must at least contain the following regulations:

- name, purpose and domicile of the cooperative;
- possible commitment of the members of the cooperative to financial or other services, kind of service and amount;
- bodies of the cooperative for administration and control and duties of the bodies;
- rules on publications of the cooperative.

Cooperatives with more than 500 members need an external, qualified annual financial auditing, just as cooperatives with business activities.

Voting rights in the general assembly are assigned according to the individual statutes of the cooperative. In the case that there are no explicit regulations in the statute, the legal rule would be “one member, one vote”. Non-member managers are legally allowed but can be restricted by the statutes of the cooperative.

3.8. Registration and control

Cooperatives have to be registered at the office of land and public registration, just like other companies. From then on the cooperatives are not controlled permanently. A control would only be started if some severe incidences occur.

Nevertheless, cooperatives have the legal duty to inform the office of land use and registration about changes in their list of members within three months. It has to contain the names of the individual members of the cooperative (including address) and/or collective members (name of the enterprises and domicile).

3.9. Transformation and conversion

Transfers from the legal form of a cooperative to another legal form are allowed although in reality this does not occur.

3.10. Specific tax treatment

The Liechtenstein tax law makes a difference between alp, forest and land-cooperatives on one side, commercially active cooperatives like dairy cooperatives or trade cooperatives on the other side, and finally nonprofit cooperatives of public utility .

The first two types of cooperatives have to pay taxes, namely property tax and income tax. But their tax level is different.

For alp, forest and land cooperatives the basic tax unit amounts to 1.5% property tax and 3% income tax. This is 50% above the basic tax unit for other natural and juristic persons. But there is no progression on the basic tax unit for these kinds of cooperatives, whereas the tax for commercially active cooperatives rises steadily according the size of property and income.

Commercially active cooperatives are generally treated like other companies and enterprises concerning property tax [“*Kapitalsteuer*”] and income tax [“*Ertragssteuer*”]. Self-helping cooperatives [“*Selbsthilfegenossenschaften*”] and insurance associations [“*Versicherungsvereine auf Gegenseitigkeit*”], however, are exempted from this rule, as long as they are mainly supporting the interest of their members and only moderately distributing benefits. For them, a reduced tax regime is valid.

Finally, nonprofit cooperatives of public utility such as cultural, social, academic etc. cooperatives are completely exempted from tax payments.

To summarise, for tax classification it is more relevant what kind of activity or business a corporation exercises than whether it has the legal form of a cooperative.

3.11. Existing draft proposing new legislation.

At the moment there is no new legislation concerning cooperatives projected in Liechtenstein.

3.12. Essential bibliography

There are no specific publications on Liechtenstein cooperatives or the related laws.

4. The SCE Regulation and national law on cooperatives

The main differences between SCE regulations, implemented in the Liechtenstein law, and the formerly and still existing national legislation on cooperatives are the following:

- minimum capital requirement for SCEs of 30.000 Euro, US dollars, or Swiss francs; no minimum capital requirement on national level;
- legal framework of employee participation on SCE level; specific participation rules in the statutes of cooperatives on national level;
- border-crossing activities of SCEs; not defined, but usually national or local activity of national cooperatives;
- publication of SCEs on European level; registration of national cooperatives on national level.

The SCE laws and the formerly and still existing national legislation on cooperatives do exist in parallel. The SCEs have their own separate laws, whereas national cooperatives are specifically regulated in a chapter of the Liechtenstein person and company law. The implementation of SCE law in Liechtenstein has not affected the legislation on national cooperatives.

The national (or mainly local) cooperatives of Liechtenstein originate from a rural background with their main purposes of common use of land, forests or alps, or the marketing of milk and milk products. Others have cultural or ecological goals and backgrounds with a local or regional focus. This kind of activity does not call for the foundation of a cross-border oriented SCE. In addition, the foundation of an SCE would demand minimum financial requirements and specific participation rights which does not fit in an optimal way to local and individually organized cooperatives.

After all there are only a small number of cooperatives in Liechtenstein, amounting to some dozens. The main legal form in Liechtenstein is the foundation [”*Stiftung*”], the dominant legal form of commercially active enterprises are the establishment [“*Anstalt*”; about 15.000] and the stock corporation [“*Aktiengesellschaft*”, about 7.500]. For profit oriented enterprises, the legal form of a cooperative does not seem to be very attractive

since the main purpose of the cooperative is the support of its members. Establishments and stock corporations have a more flexible legal form compared to cooperatives, including SCEs, which fits much better to commercial enterprises, whereas the legal form of cooperatives is limited to self-helping corporations.

LITHUANIA

By Dalia Vasarienė and Agne Tikniutė

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Lithuanian legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Lithuanian legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition of cooperative society. Law on Cooperative Societies, art. 2, par. 2 – **3.3.** Restriction on the activities of cooperatives. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Essential bibliography. – **4.** Visibility of the cooperative sector.

1. The implementation of SCE Regulation 1435/2003 in Lithuanian legislation

1.1. Source, time and modes of implementation

The SCE Regulation has been implemented through a special Law on European Cooperative Societies Nr. X-696. See provided an official English translation. SCE Regulation has been implemented by the Law on European Cooperative societies on June 15, year 2006, entered into force in August 18.

1.2. Structure and main contents of the regulation

Lithuanian law on European Cooperative societies is concise; generally it is designed just to meet all the obligations imposed by the SCE Regulation to member states. Though Lithuanian legislators decided not to exercise the options granted in article 2, paragraph 2; article 7, paragraph 7 subpar. 2; article 11, paragraph 4 subpar.2; article 12, paragraph 2; article 14; paragraph 1 ;subpar.2; article 28, paragraph 2; article 35, paragraph 7; article 37, paragraph 2, subpar. 2, paragraph 3; article 40, paragraph 3; article 47, paragraph 2, subpar.2, paragraph,4; article 50, paragraph 3; article 54, paragraph 1; article 61, paragraph 3, subpar.2; article 68, paragraph 1; article 77, paragraphs 1, 2 of SCE Regulation.

The issues which Lithuania has not been obliged to address directly while implementing the Regulation, for example, liability of the head of administration, procedural requirements on the approval of the draft terms of merger by the meeting of a cooperative society, et cetera, are left out of the existing Lithuanian law.

Main contents of the Law: The Law on European Cooperative societies regulates the formation, management, conversion of the SCE and transfer of its registered office. The Law also states that European cooperative society's statutes must list the categories of transactions requiring a decision of the general meeting, enumerates rights and duties of the administrator of the Register of Legal Entities.

There are no specific rules and/or operational, territorial or other restrictions, obligations or obstacles related to the nature of business or to the free exercise of certain activities to be carried out by the SCE.

1.3. The designated Authority/ies as requried by art. 78, par. 2, SCE Reg.

Ministry of Justice.

1.4. Essential bibliography

There is no essential bibliography.

Scerbina – Dalibagiene, S., (2006). Europos kooperatine bendrove // Saskaityba: apskaita, mokesciai, auditas, No. 9 (193), p. 37 – 39.

2. A comment on the implementation of the SCE Regulation in Lithuanian legislation

Three ministries are involved in the regulation and monitoring of the cooperative sector in Lithuania: Ministry of Economy, Agriculture and Finance. The Ministry of Agriculture is responsible for legal supervision and development of cooperative societies, the Ministry of Finance and the Bank of Lithuania are in charge of credit unions, the Ministry of Economy for European cooperative societies. The implementation of SCE Regulation was exercised by the Ministry of Economy.

Essentially, there was no national debate among legal scholars, representative organisations of the cooperative movement and public bodies before the implementation of the Regulation. All the work was done by the officials of the Ministry of Economy. Formally, for the implementation of SCE Regulation, the special committee was instituted by the Ministry of Economy, which involved the representatives of the three ministries monitoring the cooperative sector (Ministry of Agriculture, Economy and Finance) and representative from the Union of Lithuanian Cooperatives. It has to be mentioned that there were some short publications in press and on the website of the Ministry of Economy (See. 1.4.), but they both were of an introductory character, lacking deeper analytical discourse. The lack

of proper understanding by the market players of the possibilities brought by SCE Reg. could be one of the main reasons why the implementation of SCE still remains in papers. (this fact is emphasized by the report of the Register of Legal Entities indicating that there has not been any SCE registered in Lithuania by April 2010).

The reasons why the SCE legal form has not been adopted by national cooperatives for cross-border activities clearly have more social – economical, than legal, roots. In the opinion of experts, the Lithuanian cooperative sector develops vaguely and this is determined by shortage of information on the advantages on formal cooperation, poor initiative of people, and overall their unwillingness to cooperate. The better practice is found only in financial services (credit unions) and agricultural and food production (cooperative societies); besides the above mentioned sectors, cooperatives are relatively successful in forestry and fishery.

The research "Observation and Evaluation of Cooperation Activities" performed by the Lithuanian Institute of Agrarian Economics in the year 2008 revealed that there is a lack of information about the benefits of cooperation, as well as positive examples. The research also revealed the main reason for non-cooperation in agriculture, basically ignorance of cooperation benefits. The research showed that respondents do not know any cooperatives in the vicinity, they do not need cooperation, nobody invites to join a cooperative, the shortage of knowledge. But every third respondent indicated that neighbours help each other without legal formalization of activity. It allows concluding that in rural Lithuania informal cooperation is widespread. The reasons for the unwillingness to formalize the cooperation are: unwillingness to change habits of business and search for new business alternatives (2/3 of all farmers are pension age), unwillingness to devote own earnings and time to a formalization activity[131].

It has been already mentioned that in Lithuania only two sectors of cooperatives grow steadily – credit unions and agricultural cooperatives. Two Ministries (Finance and Agricultural) are responsible for their development. And for popularization of the cooperative as an organizational form, there isn't any institutional attention paid. Thus it may be suggested that the establishment of a governmental institution with the aim of supervising and coordinating the cooperative form, both national and cross border, in general, no matter in which sector it operates, would improve the growth of the cooperative sector.

The second reason why in Lithuania the European cooperative societies are not formed is local nature of Lithuanian economics - market players barely feel the need to overstep national borders and establish companies of European level. This suggestion is proved by the fact that the other European legal entities – EC and EEIG are also not popular in Lithuania (there are only a couple of EEIG's formed).

[131] Lithuanian Institute of Agrarian Economics "Observing and Evaluation of Cooperation Activities", 2008, p.28-33.

To sum up, it can be stated that the Ministry of Economy in approach of legal techniques had properly implemented the SCE Regulation. According to the Ministry officials, they considered as their task only the transmission of the legal form of European Cooperative Society in Lithuanian law. The issue of this new legal form's interrelationship with Lithuanian cooperative law and its perspectives actually haven't been much discussed.

3. Overview of national cooperative law

3.1. Sources and legislation features

Cooperatives in Lithuania are regulated by two separate laws – a general Law on Cooperative Societies[132], which regulates all cooperatives and a specific law (Law on Credit Unions[133]) for credit unions, whose organizational form is also a cooperative. The general issues that are not covered in the above mentioned laws are regulated by Lithuanian Civil Code 2001. Although formally credit unions are also cooperatives, and the Law on Cooperative societies could be considered to apply to them as a general one, actually the special Law on Credit Unions covers all the matters concerning credit unions (except very general matters, covered by Civil code), thus the Law on Cooperative Societies practically is not applied to credit unions.

3.2. Definition of cooperative society. Law on Cooperative Societies, art. 2, par. 2

"A cooperative society is an economic entity, established by a group of natural or (and) legal persons according to the laws, for the purpose of meeting business, cultural and social needs of its members. The members contribute the assets for the capital formation and distribute the risks and profits proportionate to the volume of the member's operations (turnover) with the company and actively participate in the management."

At the moment (2010.04.08) a change in the definition of cooperative society is proposed, but is still not approved by the Parliament.

The proposed definition: "2. **A cooperative society** is an enterprise established according to the laws by natural persons and (or) by legal entities set up in the Republic of Lithuania, by legal entities or other organizations and their subsidiary companies (hereafter – legal entity) set up in European Union member state or in the member state of European Economic Area for the purpose of meeting economic, social and cultural needs of its members. Its members tender assets for the capital formation and distribute the risks and

[132] Law on Cooperative societes, Nr. *IX-903*, 2002-05-28, Žin., 2002, Nr. 57-2296 (2002-06-12)
[133] Law on Credit Unions, *Nr. X-1615, 2008-06-17, Žin., 2008, Nr. 76-3003 (2008-07-05)*

profits according to their turnover of goods and services with the society and actively participate in the management of the cooperative society."

Definition of credit unions, Law on Credit unions, Article 4, Paragraph 2

"**A credit union** – is a credit institution, which meets economic and social needs of its members and is licensed to engage in acceptance and lending deposit accounts and other repayable assets from and to non-professional market participants determined in the Law on Credit Unions, and also is eligible to render other services stated in the Law."

3.3. Restriction on the activities of cooperatives

Cooperative society as a legal form is not subject to any restrictions on activities. Basically, cooperatives are permitted to engage in any kind of economic or social activity. The restrictions, due to the lack of creditor protection instruments, such as statutory authorized capital, corporate legal form, licensing requirements, concerning services of the banks, insurance companies, e*t cetera* also apply to cooperatives, as to any other organizational form in Lithuania.

From that perspective, credit unions are in a completely different situation. They are permitted to provide only those financial services which are explicitly defined in the Law on Credit Unions.

Cooperative society's dealing with non-members. According to the Law on Cooperative Societies, economic activity of cooperatives with persons who are not members of cooperative is not restricted. However, certain activities can be restricted in the articles of association.

The credit unions are under a different regime in this respect. The right of a credit union to render services to individuals and/or entities not belonging to the union is partially restricted. The credit union (Article 4, paragraph 4, Law on Credit Unions) has a right to provide financial services not only for its members and associated members, associations of credit unions, credit unions, Central Credit Union, but also to the institutions of the Republic of Lithuania and municipal institutions, if it is so provided in the articles of association of credit unions, associations, religious communities and labour unions set up in Lithuania, national, international and foreign charity foundations, as well as to minor children of union members.

3.4. Forms and modes of setting up

Formation of cooperative society: Law on Cooperative Societies, article 4

1. The incorporators of a cooperative society should be at least 5 natural and (or) legal persons. Each incorporator of a cooperative society should become its member.

The incorporators of a cooperative society form a founding agreement (memorandum of association) of the cooperative society, prepare the project of the cooperative society's statutes (articles of association), convene the general meeting. Founding agreement is a public document.

(...)

5. The founding agreement should be signed by all incorporators: natural persons and (or) authorized representatives of legal entities. The authenticity of the signatures of natural persons signing the founding agreement of cooperative society shall be notarized.

6. The founding agreement of cooperative society grants the right to open an account of cooperative society at the bank of the Republic of Lithuania. (…)

The cooperative society has to be registered at the Register of Legal Entities. From the moment of registration cooperative society incurs legal capacity.

Formation of Credit Union: Law on Credit Unions, article 5.

1. A credit union is formed by the order determined in Civil Code, Law of Financial Institutions of the Republic of Lithuania, by the Law on Credit Unions and, if the special laws does not determine otherwise, by the order set out in the Law on Cooperative Societies (cooperatives) of the Republic of Lithuania.

2. A credit union may be formed just for indefinite period.

3. A credit union may be formed when it obtains permission of supervisory institution (Bank of Lithuania) to establish the credit union.

4. The statutes of the credit union should be submitted to the Register of Legal Entities and a credit union should be formed in a period of 9 months from signing the statutes (articles of association). If it is not registered through this period, the statutes of credit union become invalid.

5. A credit union is established by collecting funds for covering the expenses related to the formation thereof from the paid amounts of entrance fees and by accumulating share capital from the share contributions.

6. The incorporators of credit union may be only natural entities. A credit union may be established by no less than 5 incorporators.

7. The incorporators of a credit union, also natural and legal persons, who are entitled to be the members of the credit union, can purchase its shares. Each founder of credit union must purchase shares of a credit union and pay fixed share contribution.

8. The founders of credit union may not be natural persons, who may not be the incorporators of financial institutions according to the Law of Financial Institutions of the Republic of Lithuania, and natural persons, who may not be the members of credit union.

9. The founders conclude the founding agreement of the credit union. (…)

10. All founders must sign the founding agreement. Signatures authenticity of natural entities shall be notarized.

11. The founding agreement, concluded in accordance with the procedure established by the law, is a public document and grants the right to open an account in a bank registered in the Republic of Lithuania or in the Central Credit Union.

12. The founders shall draft the statutes (articles of association) of the credit union and present them to the statutory meeting for approval. Prior to the statutory meeting the founders must record in the register of members the persons who have acquired shares in the credit union which is being established.

13. Minimum share capital must be accumulated and shares of at least 50 persons must be paid up prior to the statutory meeting.

14. Prior to the statutory meeting, founders have the right to conclude transactions on behalf of the credit union and for its sake, provided it is not stated otherwise in the founding agreement.(…)

3.5. Membership

Minimum member requirement for cooperative societies is 5, natural and legal persons permitted (article 3, paragraph 3.)

Order of becoming a member. Law on cooperative societies, art. 8, paragraph 2:

2. A person, preferring to become a member of cooperative society, has to present an application. The application is processed and person is admitted to cooperative society according to terms and order determined in the statutes of cooperative society, provided he paid an entrance fee and his share is not less than minimum share. If a person is not admitted to cooperative society, entrance fee and share contribution are returned according to the order and terms determined in the statutes, but not later than within 3 months.

The order of becoming a member of a credit union is not regulated separately in the Law on Credit Unions, only general requirements for members are provided.

For credit unions, the requirement of a minimum of 5 founders is established (Art 5. paragraph 6), as well as a minimum of 50 credit union members. Only natural persons are allowed to be the founders of a credit union, but the members may be not only natural, but also legal persons stated below, in article 13, of the Law on Credit Unions:

1. The members of a credit union may be a legally competent natural person with the permanent residence in the Republic of Lithuania. The natural person may be the member of a credit union, if he lives, works or studies in a municipality of the Republic of Lithuania, where the residence of credit union is registered, or in the municipalities bordering with this municipality if it is so permitted in the statutes of the credit union.

2. The associated members of credit union may be the legal entities registered in the Republic of Lithuania and having residence in a territory of municipality, where residence

of credit union is registered, and in other municipalities bordering with this municipality if it is so determined in the statutes of credit union.

5. A credit union has at least 50 members, excluding associated members.

In Lithuanian law investor members are not allowed (only user members) in cooperative societies as well as in credit unions.

3.6. Financial profiles

There is no minimum capital requirement *for the establishment of a cooperative.* The capital of cooperatives is variable. The distribution of the after-tax net profit earned by a cooperative society during a business year must be approved no later than within 4 months of the end of the business year. Net profit shall be distributed in the following manner: 1) deductions to capital reserve fund; 2) a part of the profit proportionate to the volume of the turnover with the cooperative society (patronage refunds) paid out to its members; 3) dividends paid to the members of the cooperative society in proportion to their member shares.

Up to 10 percent from net profit could be dedicated for paid dividends. Maximum amount of dividend is defined by the bylaws of the cooperative company.

the treatment of patronage refunds (i.e., user-member ex post remuneration);

Cooperative companies' own capital is divided into core and reserve capital. Core capital is used for economic activity and purchasing property for the cooperative company. Reserve capital by decision of members' meeting is used for unexpected expenditure and refunds; and the part of reserve capital which exceeds 1/10 of own capital, according the decision of the members meeting, may be used for other purposes. The payoffs to reserve capital are obligatory for a cooperative company, while reserve capital doesn't amount to 1/10 of own capital. Obligatory payoffs to reserve capital must amount to no less than 5 percent of net profit.

In the event of liquidating the cooperative, after 5 months from the day of the liquidation announcement the remaining assets are divided among members under the order defined in the bylaws of the cooperative company, considering to their share in the cooperative. If a dispute arises among the members of a cooperative company due to division of remaining assets, the liquidator (liquidation commission) suspends the division of assets. Disputes between members and with the liquidator are adjudicated by trial.

Cooperatives cannot issue financial instruments.

Cooperatives are obliged to provide public financial statements to the Central Registry.

3.7. Organizational profiles

Structure of cooperative, Systems of governance:

The bodies of cooperative society: Article 15.

1. The bodies of cooperative society are the general meeting, the board and the manager.

2. In a cooperative society with the membership exceeding 100, the general meeting may be substituted by the meeting of representatives. The meeting of representatives has the competence of the general meeting of the members. Each representative has one vote at the meeting of representatives. The order and circumstances of electing and recalling representatives shall be determined in the statutes of cooperative company. Auditing is obligatory for a cooperative society which statutes intend to replace the general meeting by meeting of the representatives.

3. In the statutes of cooperative society with less than 50 members could be determined that the board is not elected and its functions are performed by the manager.

Voting rights: general rule – one member, one vote.

Exceptions: Law on Cooperative societies, art 11:

2) (...) In the statutes of cooperative society with more than a half of the members being cooperative societies, may be determined that a number of votes is assigned to the member according to its participation in an activity of cooperative society (turnover), but not including its capital investments (share contributions). Under above stated circumstances the member is permitted to have up to 5 votes, though not more than 30 percent of all votes. The provision of voting according to participation in an activity of society is not applied and each member of the cooperative society has one vote despite his share, if the number of members decreases to half of all members. The member of cooperative company has a right to assign his right to vote to other member of cooperative society or to a representative or to a third party or to assigned person, who may represent him at members' meeting. In the statutes of cooperative society the maximum number of members that could be represented by one representative should be determined.

Rules on the formation of the management body

Art 17. Board and manager of cooperative society

1. The board is a collegial managing body of cooperative society. The chairman manages the activity of the board. The number of board members shall be determined in the statutes, though it cannot be less than 3.

2. Members of the board and the chairman are elected by the general meeting for the period not longer than 4 years. The member of board, the chairman or the entire board may be recalled or can resign according to the order assigned in the statutes prior to the expiration of their term of office. (…)

4. The board adopts resolutions with a quorum of at least 2/3 of board members. Resolutions shall be adopted by majority vote. The procedure of convening and

scheduling the board meeting is defined in regulations of board schedule. The board invites the manager to each meeting, if he is not the member of the board.

5. There should be manager at the cooperative society despite the board is constituted or not.

6. The manager is elected and recalled by the board, if the board is not constituted, then by the general meeting of members. The chairman of the board signs the employment contract with the manager, if the board is not constituted - then the representative of the general meeting performs its functions.

7. The member of the board, its chairman, the member of cooperative society as well as a natural person with legal capacity can be the manager. The requirements for the manager are determined at its bylaws. The manager cannot be the member of audit commission and its chairman (inspector).

8. The manager is one-man managing body, who manages the administration. (…)

9. The manager of administration participates at the meetings of the board with advisory vote privilege, if he is not the member of the board.

Law on Credit Unions, Article 2, Management Bodies:

1. The bodies of the credit union shall be the general meeting, the supervisory board, the board and the manager (chief executive).

2. The management bodies are the Board and the manager (chief executive).

3.The composition, administration and liabilities of the bodies of the credit union is specified in the bylaws of the credit union, Lithuanian Civil Code, as well as The Law on Financial Institutions and the Law on Cooperatives societies (see above).

Article 28. The board of credit union

1. Only members of credit union may be elected as the board members. The board of credit union must have at least 3 members.

2. The members of the board and its chairman are elected by general meeting of members of credit union for the cadence not longer than 4 years.

Art 29.5. The member of the Supervisory board of credit union, member of committee of loans, member of auditing committee (inspector), persons who are the board members and administration managers of other credit institutions cannot be administration manager of a credit union.

If and when it is required to hire an external auditor, etc.

Control of activities of the cooperative society

Article 18. Control of activities

1. Economical and financial activities of cooperative society are supervised by auditing committee (inspector). The members of auditing committee and its chairman (inspector) are elected at general meeting of cooperative society for a cadence not longer than 4 years. In the statutes of cooperative society may be assigned that its economic financial activities are controlled by the audit company confirmed by members meeting. (…)

4. The general meeting of cooperative society, the board (if it is not constituted, then the manager of administration), auditing committee (inspector) may invite the experts for inspections. (…)

Control of activities of Credit Union, Art 32: Offices, commissions and committees of credit union

1. If assets of credit union are less than 10 million litas, the revision committee should be elected. If the assets of credit union reach 10 million litas or more, independent audit should be requested (…). Revision committee could not be elected, if general meeting of members adopts resolution that audit of credit union shall be performed by the audit company, or in case the audit of credit union is obligatory.

2. When the assets of the credit union reach 10 million litas, the credit union must form permanent internal audit service. The internal audit service is elected and recalled by the supervisory board. An internal audit service reports to general meeting and supervisory board according to rules set in its statutes but at least once a year.

3. The loan committee is obligatory for a credit union.

Art 31 Internal control of credit union activity

The Law of Financial Institutions of the Republic of Lithuania, Law on Credit Unions and regulations of supervisory body sets the requirements of internal control of credit union.

3.8. Registration and control

Newly formed cooperative societies are registered in the Central Registry of Legal Entities. Provision of the data is regulated by the *Law of cooperative societies (cooperatives)* and by the *Civil code of the Republic of* Lithuania. The Central Registry of Legal Entities also registers court restrictions of activities, legal status, register data, as well as other information. Each year, cooperative societies provide documents of annual financial statement to the Central Registry of Legal Entities.

The Department of Statistics of the Government of the Republic of Lithuania also collects the financial data of some cooperative societies (CS). Each year CSs **selected** by the Department of Statistics must provide quarterly and annual reports of general financial information of the society. The Department of Statistics collects financial information of residual CSs from other sources. Under this research, statistical data is prepared, coefficients of profitability, liquidity and financial risks of societies are calculated according to the type of economic activities. On a quarterly and annual basis, the societies provide data about fixed and current assets, equity capital and liabilities, purchase, income, costs and profit for the statistical needs.

Agriculture Information and Rural Business Centre is responsible for cooperative societies acknowledged as agricultural cooperative societies.

Cooperation Coordination Centre of the Chamber of Agriculture is responsible for development of cooperatives in agriculture. The Cooperation Coordination Centre annually collects information about the activities of cooperatives. Data of CS (C) which is collected: information about core and secondary business, members and employees, establishment date, place of business of cooperative societies and information about the production.

National paying agency provides information about number of companies, among others - cooperative societies, which had received financial support on the basis of different programmes as a result of project implementations.[134]

In summary, cooperatives are subject to the same requirements as other profit making organizations; there are no additional requirements.

The supervisory institution of credit unions is the Bank of Lithuania.

3.9. Transformation and conversion

Art 20. Conversion of cooperative society

1. Cooperative society is converted according to the Law on Cooperative Societies and of Civil Code. After conversion all rights and duties of converted cooperative society are transferred to the converted legal entity.

2. The resolution on the approval of conversion of cooperative society shall be approved by at least 2/3 of votes of cooperative society members, registered in the list of participants.

3. Cooperative society must make a public announcement 3 times about its conversion, according to the order determined in the statutes, with the intervals not less than 30 days, or once not later than 30 days before adopting the resolution of conversion and must inform all creditors of cooperative society in written form. (…)

4. The document proving announcement of conversion of cooperative society must be presented to the Register of Legal Entities not later than a first day of public announcement. The Register of Legal Entities must publicize the resolution to convert the cooperative society in a way stated in the statutes.

5. The conversion is considered to be completed when the new legal entity, remaining after conversion, is registered in the Register of Legal Entities.

6. The conversion is considered to be void, if founding documents are presented to the Register after 6 months from accepting the resolution to convert cooperative society.

Credit unions cannot be converted into other legal forms (the Law of credit unions, Art 67, 2)

In the Law on Cooperative Societies (see article 20) and Lithuanian Civil Code there are no obstacles for a cooperative to be transformed into a different legal form of enterprise,

[134] Psl35

but actually there are no clear provisions or practice to which legal forms it could be actually converted.

3.10. Specific tax treatment

The standard treatment for companies and enterprises applies to cooperatives with some exceptions in Lithuania.

Exceptions:

1. For the participants (members) of cooperative company (cooperative) from benefit, in 2009 it is applied a rate of 5 percent from income tax of individuals, in 2010 – rate of 10 percent from income tax of individuals.

2. The real estate of cooperative companies (cooperatives) is not taxed under the law on real estate tax of The Republic of Lithuania.

3. Taxed profit (or its part) of cooperative companies (cooperatives) proportionally falling to shareholders according the value of their share contribution as of the last day of the taxing period is taxed applying 0 percentage rate of profits tax, if:

1) during taxing period more than 50 percent of the income of the cooperative company (cooperative) is income from agricultural activity, or

2) during the taxing period more than 85 percent of income of the cooperative company (cooperative) is income from agricultural activity and (or) income from sales, purchased from its members, agricultural products produced by these members and (or) sold fuel, fertilizers, seeds, fodders, aids from pests and weeds to its members and tangible property, dedicated for use only in agricultural activity of its members.

4. If a member of a cooperative company that distributes benefit disbursing dividends, the sum in cash of deducted profits tax is counted and reduces profit tax sum of dividends receiving Lithuanian unit for this taxable period, when the tax was deducted from dividends paid to him. If dividends receiving Lithuanian unit offset deducted tax sum exceeds this units sum of payable benefit tax for this taxable period, when tax was offset defined in the law of tax administration of the republic of Lithuania.

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4. Visibility of the cooperative sector

All business management studies traditionally include courses on cooperatives in Lithuania. Sometimes several lectures on cooperatives are included in general courses about enterprises.

There were several studies, analyses, researches made on the topic of the cooperative movement in Lithuania.

- The study "***Cooperative groups' influence to its members – small businesses competitive ability***" was accomplished by the order of the European Commission on January 2008. It was prepared by London Economics (one of the main economic consultants in Europe).
- Lithuanian Institute of Agrarian Economics, department of rural development 2008 and 2007 prepared reports ***"Monitoring and evaluation of cooperation activity"***. Supervisor G.Kuliešis.
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There are a lot of different forms of business support services in Lithuania. There is a network of publically offered services for business – INFOTINKLAS (Infonetwork). The network of publically offered services for business is an infrastructure of business support which is imposed to stimulate establishment and development of small and average businesses and to ensure availability of qualified, under preferential terms, rendered business services for businessmen from all regions of Lithuania.

The network of such public organizations, whose founder and one of the shareholders is the Ministry of Economy of the Republic of Lithuania (further in the text - Ministry of Economy), consists of 42 business information centres (BIC) and 6 business incubators (BI). It provides free or less than market price information and consultations, teaches, organizes events of business information dispersion and various companies encouraging enterprise, helps prepare business plans and applications to get support from European Union (EU) structural funds, etc. for subjects of small and average businesses and natural entities.

The activity of the network is coordinated by the Department of small and average business of Ministry of Economy.

Business incubator – is a public organization acting in the territory of one county or several municipalities, which for incubated economy subjects referentially rents premises, technical or office equipment, provides business information, consulting and teaching services.

The main aim of the business incubator is to sponsor novice businessmen, encourage creation of new workspace, reduce the risk of operating companies and to help companies that have good business ideas, though are weak financially, to reach a higher level than they could on one's own and engage in economical commercial activity and compete in the market.

While reaching this aim, a business incubator:

- Rents its property (premises, offices and technical equipment);

- Provides information, consulting, teaching services and organizes informational dispersion events;
- Manages accounting of incubated companies;
- Provides office services (telephone, fax, documentation, copying, internet connection and so on).

There are 6 such business incubators in different regions of Lithuania – Alytus, Kaunas, Šiauliai, Telšiai, Vilnius, Ignalina.

Business information Centre – is a public organization acting in the territory of one or several municipalities which, for subjects of small and average business and natural entities of this territory who intend to start a business, preferentially provides business information and consulting services; organizes teaching, events of information dispersion, various companies of encouraging enterprise; and intercedes in looking for business partners in Lithuania and abroad.

Business information centres also perform procedures of registering companies; prepare business plans and other documentations necessary for businessmen; consult about questions about sponsorship of European Union structural funds and prepare documents for getting the support from structural funds from the European Union, and provide various office services (fax sending/receiving, copying, printing, use of internet, rent of chamber and equipment, etc.).

More information about services and prices of business information centres can be found at particular business information centres.

Most centres have websites where the information about the activity and services of the centre can be found; all provide information by phone and e-mail. Currently in Lithuania there are 42 business information centres, 14 of them are tourism and business information centres.

Public organization Lithuanian Innovation Centre (hereafter LIC) is a non-profit organization providing innovation support services to enterprises, scientific and study institutions, Lithuanian business associated structures and business support organizations.

LIC founders and shareholders: Ministry of Economy, Ministry of Education and Science and Lithuanian Confederation of Industrialists.

LUXEMBOURG

By David Hiez

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Luxembourgian legislation. – **1.1.** Source, time and modes of implementation. – **2.** Overview of national cooperative law. – **2.1.** Sources and legislation features. – **2.2.** Definition and aim of cooperatives. – **2.3.** Activity. – **2.4.** Forms and modes of setting up. – **2.5.** Membership. – **2.6.** Financial profiles. – **2.7.** Organisational profiles. – **2.8.** Registration and control. – **2.9.** Transformation and conversion. – **2.10.** Specific tax treatment. – **2.11.** Existing draft proposing new legislation. – **2.12.** Essential bibliography. – **3.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Luxembourgian legislation

1.1. Source, time and modes of implementation

A proposition of implementation of the European regulation has been deposited to the parliament of Luxembourg in 2008, the 18th of December (projet de loi n° 5974). Nevertheless, no further step in the legislative process happened: no comment, no commission meeting. The Minister of Justice in charge of the question admits that there are several implementations late and explains that there is no real necessity to proceed to the implementation of the SCE. The directive about the implication of workers in the SCE has been implemented (law 18 march 2009 implementing the Directive 2003/72/CE of the 22 july 2003 completing the SCE statute as regards to workers' involvement).

2. Overview of national cooperative law

Translation of the main provisions
Statute of the 10th of August, 1915: commercial companies
Section VI: cooperative societies
Preliminary remarks

We translated only few provisions because many of them are very technical and quite ancient, so that they are not very interesting.

We followed the terminology of European regulation, but we had some hesitations to translate some words: "société", "associé". Two translations are possible because the word "société" can mean in French both society and company. It is common to translate "société cooperative" by "cooperative society" and we made also that choice. But, it is not sure it is the good one. It gives a more attractive picture of the cooperative, but may not fit

Luxemburgish law. The place and the philosophy of the regulation of cooperatives in that country seems to include cooperatives amidst commercial companies, so to say commercial terminology could be more appropriate.

Art. 113. A cooperative society is a society which is composed of variable number of members or of members who can subscribe a variable amount of capital and whose shares cannot be sold to non-members.

Art. 114. (…)

The society has to be composed of at least seven persons.

It is governed by one or several representatives, member or not, who are only responsible for their mandate.

The watch of the society is attributed to one or several audits, members or not.

The members may be liable jointly or not, severally or till a fixed amount.

Art. 115. The constituted act of the society must contain, but being void, provisions about the following points:

1° The name and the registered office of the society;

2° the object of the society;

3° the precise designation of the members;

4° the way the capital is or will be formed and the minimum immediate subscription.

These illegalities cannot be opposed by members to non-members. Between members, if the society is declared null and void, it has no effect before the day of the claim.

Art. 117. In absence of provisions about the points of the previous article, they will be ruled as follows:

1° The society lasts ten years;

2° the members can only be excluded from the society because of non performance of the contract; the general meeting decides the exclusions and admissions and allows the subscription resignations;

3° the society is managed by a manager and watched by an auditor who is designed, resigned and deciding in the same way as in public limited-liability companies;

4° all the members may vote in general meetings, their vote is equal. The convocations are made by recorded delivery letter, signed by the board; the powers of the general meeting and its decision procedures are the ones of the public limited-liability company.

5° Profit and losses are yearly distributed half equally between the members, half proportionally to their stake in the capital.

6° Members are liable jointly and severally.

Grand-ducal decreeof the 17th of September, 1951: the organisation of agricultural associations (extract)

Art. 1. May be created in application of this statute as agricultural association the ones which pursue one of several of the following aims:

1° collective purchase of any object aimed to farm or wine-growing.

(…)

The associations mentioned in this article may have as members a minority of non farmers.

Art. 3. (…) The association is registered to the commerce and companies register but that registration has no effect on a commercial aspect of this association.

Art. 7. Except the obligatory provisions mentioned in article 5, the statutes of the SCE regulate the following points:

(…)

5° (…) the rule for voting, the vote of a member being regarded at least as one vote and not more than three.

In any case, the association may not distribute benefits. The payment of dividends to the members in proportion to the business realized by each member with the association is not treated as benefits distribution.

Depending on the features of the national legal system, this section can be limited to the analysis of the general law on cooperatives or may also take into account the main special laws on particular types of cooperatives (such as worker, agricultural, housing cooperatives, etc.), inasmuch as they contain exceptions to the general rules or provisions that are worth mentioning.

2.1. Sources and legislation features

The cooperatives are regulated in Luxemburg on the model of Belgian law. It is therefore drafted in the law about commercial companies, adopted in 1915. That place of cooperatives with commercial companies is very important because it shows the way cooperatives are considered in the regulation. In the beginning of the 20th century, the Luxemburgish government considered cooperatives as an answer to the social problems, but wanted in the meantime to prevent itself from the possible political activities it could create. The best way was to insert cooperatives into the economic activities, with close rules. And no important change has been made in the regulation since that time.

The section concerning cooperatives contains two subsections: one general, and one concerning cooperatives organised as public limited-liability companies. That kind of cooperative, created by the statute of the 10 of June, 1999[135], has nothing to do with cooperatives and uses its name only to avoid some other provisions. It is significant that article 137-1 states explicitly that this company is not submitted to the regulation about SCE. We won't take that false cooperative here. The provisions concerning the SCE will be integrated in a third sub-section. In other words, there is only a general approach of cooperatives, which is linked to their weak weight in the country. Another statute must be

[135] Mém. A – 69, 11 june 1999, p. 1469; doc. parl. 4463A.

mentioned for what is called (association agricole) agricultural association[136]. By its name, it is distinct of cooperatives, but its regulation is closer to the cooperatives principles of the ICA than the one of proper cooperatives. Luxemburgish farmers do not mistake themselves and reserve the word of Genossenschaft ("cooperatives" in German) for these organisations.

2.2. Definition and aim of cooperatives

The cooperative is defined by article 113 of the statute about commercial companies. This provision shows two features for the cooperative: first, variability of capital (the variability of the members is another aspect of the same feature), and the impossibility to sell shares to non-members. A contrario, there is no provision about the purpose of the cooperative. That means that it can be aimed to any activity, without any restriction, and there is no special rule for any, but that implies also that no special link is established between the cooperative and its members.

Being drafted into the statute about commercial companies, the cooperative itself necessarily has a commercial nature, and maybe even a commercial company. That is explicitly stated by article 2 of the same statute: "the statute recognises six kinds of properly commercial companies: (…), the cooperative society."

The solution is totally different for cooperative associations. The article 1 of the statute about that grouping specifies, by a limitative list of permitted activities, that the aim of the association is to provide goods and services to farmers, wine-growers or foresters. This means that the object of the activity of the association is limited, but also that its aim is necessarily related to its members. Furthermore, the statute provides explicitly that the association is not commercial, whatever the rules being declared applicable.

That difference is expressed by different wordings. Whereas the members of a cooperative are designed in the law by the word "associé", they are named "members" when it is an agricultural association.

2.3. Activity

There are no explicit limitations to any activity and no judicial decisions have been pronounced about the question. As there is no academic research, it is difficult to draw clear conclusions. Nevertheless, consulting Belgian searchers, for the statutes are similar, it is possible to assert that the restrictions come from the commercial nature of the cooperative. Actually, being a company, the cooperative is ruled by article 1832 of the civil

[136] Arrêté grand-ducal, 17 september 1945 : revision of the law 27 march 1900 on the organization of agricultural associations. Mém. 51, 22 september 1945, p. 569.

code which requires that it aims to the distribution of benefits. An outdated decision has stated that a cooperative aimed to the defence of professional and material interests of its members is void because it doesn't aim to the distribution of benefits[137]. One author claims that a cooperative which would only pay dividends in proportion to the business of the members and wouldn't provide any return on paid-up capital would also be void[138]: let's remember that it is the situation of many consumer cooperatives.

As there is no relation established between members and the cooperative, there is no restriction to the activity with non-members. As we said above, it is maybe a mistake to speak of members, partners would fit better. In that case, it is clearer that there is no possible distinction between partners and non-partners concerning the business with the cooperative.

It is obviously different for the agricultural association. There is for it no possible business with non-members.

2.4. Forms and modes of setting up

There is no specific rule for the setting up of a cooperative. The founders must draft the statutes with some obligatory provisions (art. 115) and some facultative ones (art. 116). Other obligations come from the general provisions for commercial companies (arts. 1-13 of the statute), notably the registration to the commerce and companies register.

The agricultural association is registered in the same conditions. Five founders are required to set it up (art. 4, decree 1945).

2.5. Membership

There is nearly no constraint about the members in the Luxemburgish cooperative, but they must be at least seven (art. 115). No specific quality and no limitation concerning investors are drafted. The procedure for the admission of members is ruled by the statutes and, if not, the general meeting is competent.

Concerning the agricultural associations, the conditions required for the admission may be ruled by the statutes, but the procedure is stated by the statute of 1945 (art. 11): The committee decides on the applications to membership within one month.

If the committee refuses the application, it must warn the candidate within eight days by a recorded delivery letter.

[137] Court of appeal, 12 January 1928, Pas. 11, p. 267

[138] J. Corbiau, Des sociétés commerciales : avant-projet de loi élaboré pour le Grand-Duché de Luxembourg, imprimerie et librairie de la Cour Victor Buck, Luxembourg, 1905, ps. 236-239.

The candidate may, within one month, appeal to the general meeting by a recorded delivery letter sent to the President. (…)

Next general meeting decides finally by plain majority."

The statute is silent about investors, but states that the association may admit a minority of members who are not farmers (art. 1).

2.6. Financial profiles

There is no minimum capital requirement for the cooperative. Article 115 states only that the statutes of the cooperative must precise the way to constitute the capital and the immediate subscription minimum. In both groups, the capital is variable.

There is no obligatory rule about the allocation of profits in cooperatives, so statute drafters are very free. If they don't use that freedom, some basic solutions are stated. There is a share remuneration which is quite original. It is divided in two parts: one part is distributed equally to all the shareholders; the other part is in the proportion to their stake in the capital, like for any company. As the link between the cooperative and the members is not considered, there is no possible dividend in proportion to the business between both, which is totally incorrect for a cooperative. A reserve is obligatory (art. 129), on the model of the one stated for public limited liability company (art. 72): till the amount of the reserve is less than ten percent of the capital, twenty percent of the net profit. It is significant that art. 129 is integrated in a title dealing with "measures to protect non members", whereas reserve is commonly aimed to the development of the cooperative. No provision deals with the use of the reserves, which is therefore free, like its distribution. The solution is coherent since the reserve is not aimed to the protection of the cooperative.

Nothing is stated about reserves in agricultural associations. The only provision deals with share remuneration (art. 9): it is absolutely forbidden. The association may nevertheless distribute dividends in proportion to the business. No provision forbids paying interests to the capital.

In case a member leaves the cooperative, whatever is the cause, he receives only, if no other provision in the statute, the nominal value of his shares. The counter-part of funds allocated to the cooperative by public bodies may never be distributed. Furthermore, the liability of member may lead the cooperative to reduce the value of the shares to be repaid. The provisions are exactly similar for agricultural associations (art. 14).

As cooperatives are commercial companies, they may use any financial instrument. Article 127 provides that the rights of any member to be represented by a nominative share with its name (subscription dates, statutes of the cooperative…), but nothing forbids having other kinds of financial instruments as well.

The cooperative must respect all the accounting obligations and publish the documents in the commerce and companies register (art. 32). The managers of the cooperative will

also have to publish each six months the complete list of the members of the cooperative and are responsible in case of mistakes (art. 133). These documents may be consulted by anyone (art. 135).

2.7. Organisational profiles

The organisational profile of the cooperative is explicitly modelled on the one of the public limited liability company: article 117 provides that the functioning and the powers of the general meeting and of the managers are the same as for these companies (art. 51). There is only little peculiarity. In the first place, concerning the general meeting, if there is no other solution in the statute, the principle one person one vote applies. In the second place, for management, there is one manager in a cooperative, whereas there are three in the public limited liability company. There is also one auditor in the cooperative. But, deliberations, appointment and removal of the managers and auditors are similar to articles 51 and following. The manager is a member of the society.

2.8. Registration and control

We already mentioned the obligation for cooperative societies and agricultural associations to register to the commerce and companies register.

A political control is compulsory for the cooperative, remembrance of the mistrust of governments to that dangerous group. Article 137 provides the existence of such a control but refers to a minor statute to precise its functioning (Grand-ducal decree of 30 August 1918 on the control of cooperative societies[139]). It requires a revision each year, that revision being only financial. The reviser is appointed by the government (or a cooperatives federation, with conditions). He gives the report to the cooperative and the government. In the cooperative, the report is addressed to the general meeting. This obligation of revision appears as a measure aimed to the protection of the members, considered unable to protect themselves. The agricultural association has the same obligations (art. 20 decree 1945 referring to art. 137 statute about commercial companies).

2.9. Transformation and conversion

Being a kind of commercial company with little peculiarity, the cooperative can and may transform in another legal form without any problem. No specific provision deals with it. The situation is totally different for agricultural associations. The transformation of the

[139] Mém. 53 du 1st september 1918, p. 1051.

cooperative is a change of the statutes of the cooperative and obeys therefore to article 10, which states exceptional provisions. The general assembly is valid only if its calling mentions that change in its agenda. The meeting must then gather two thirds of the members of the association. If not, a second meeting is to be called, which is valid no matter who is present. Finally, in such a meeting, each member has as many votes as he owns shares, without any limitation, and may represent two other members. That last provision doesn't fit general principles applicable to these associations. The decision to transform the association, which requires at least two thirds of the votes, may nevertheless be valid with respect to that procedure. The article states that, even if members were unanimous, the decision to transform the association is not valid, except previous authorisation of the agriculture minister. The process of the transformation and its precise effects are not more detailed.

2.10. Specific tax treatment

As they are commercial companies, the question doesn't exist: cooperative societies are taxed like other companies. The only specific rule is for the agricultural sector and applies as well to the agricultural associations as to agricultural cooperatives: the important is the activity, which must fit (to sum up) the one defined in article 1 of the decree of 1945. If this condition is fulfilled, the group is exempted from the "impôt sur les revenus des collectivités" (income tax for companies), (art. 161 law on income tax).

2.11. Existing draft proposing new legislation

Unfortunately there isn't any. The question was evoked when the implementation of the European regulation was planned, but it appeared too complex to be realised shortly. The only possible change would come with the implementation: national cooperatives could have the possibility to chose a structure similar to the one stated for SCE, but that would touch only management.

2.12. Essential bibliography

J. Corbiau, Des sociétés commerciales : avant-projet de loi élaboré pour le Grand-Duché de Luxembourg, imprimerie et librairie de la Cour Victor Buck, Luxembourg, 1905.

D. Hiez, Le droit des coopératives luxembourgeoises au prisme de l'économie sociale et solidaire, annals de droit luxembourgeois, 2007-2008, n° 17-18, p. 99.

D. Hiez, Les coopératives luxembourgeoises : l'exemple d'un système libéral, in D. Hiez (dir.), Droit comparé des coopératives européennes, Bruxelles, Larcier, 2009, p. 145.

3. The SCE Regulation and national law on cooperatives

The situation of Luxemburgish law is quite special. There is no constraint upon cooperatives and the control of government is not strong. The difficulty for development of cooperatives resides in the definition of cooperative. It gives no substantial meaning to the cooperative and forbids anybody to identify himself to an empty project. The political opportunity could strangely come from the creation in July 2009 of a minister of "économie solidaire".

Luxembourg is therefore a country where the SCE regulation could have a very beneficial impact, for the SCE contains such a substantial definition. Unfortunately, if Luxembourg is not planning to implement the European regulation, it is maybe also not to modify its national law.

MALTA

By Saviour Rizzo

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Maltese legislation. – **1.1.** No formal transposition of the SCE Regulation. – **1.2.** Transposition of Directive 2003/72/EC: main contents of the Maltese Regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** Commentary. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Maltese legislation

1.1 No formal transposition of the SCE Regulation

Maltese law has a rather detailed legislative instrument entitled Cooperative Societies Act, 2001 (the Co-op Act) which regulates the formation, registration, organisation, operation and duties of such societies as well as the rights and duties of its members. This Act is a special law dedicated to co-operatives, distinct from both the civil code and the Companies Act. In other words Maltese cooperatives are not regulated by a general law or partially through the Maltese civil code. Recital number 6 of the EU Council Regulation (EC1435/2003) refers to the Resolution of the General Assembly of United Nations of 2001 (A/Res/56/114) which encourages all governments to ensure a supporting environment in which cooperatives can participate on an equal footing with other forms of enterprise. In this regard, the Co-operative Societies Act regulating Maltese cooperatives is, by and large, considered by Maltese legislators and Maltese legal advisers, to have the adequate legal instruments for the implementation of the SCE Regulation. Thus, according to these Maltese legislators, this SCE regulation does not require transposition into Maltese law as the provisions in the Co-operative Societies Act regulating Maltese cooperatives co-exist with the rules laid down in the SCE Regulation.

The non-transposition of the SCE Regulation into Maltese law did not cause any concern to the EU Commission. What the Commission asked from the Maltese government was the identification of the designated authority in terms of Articles 7, 29, 30, 54 and 74 of the Regulations. The Commission was informed that the designated authority is the Cooperative Board as set up by the Co-operative Societies Act of 2001.

1.2 Transposition of Directive 2003/72/EC: Main Contents of the Maltese Regulation

What needed to be transposed into Maltese law in order to make Maltese cooperative legislation conform totally with the EU Regulation (EC1435) was the Directive 2003/72/EC (referred to in Recital number 17 of the SCE Regulation) supplementing the statute for a European cooperative with regards to the involvement of employees.

This EU Council Directive has been transposed into Maltese Law in July 2007 through Legal Notice 48 of 2007 entitled Employee Involvement (European Cooperative Society) Regulations 2007. Since this directive deals with employment relations it is transposed under the legal umbrella of the Employment and Industrial Relations Act of 2002 (hereinafter referred to as EIRA). This Act, enacted in December 2002, is the main piece of legislation that regulates industrial and employment relations in Malta. It consolidates two prior pieces of legislation namely: the Industrial Relations Act (1976) and the Conditions of Employment Regulation Act (1952). EIRA is accompanied by a number of regulations which bring into force specific provisions. The passage of these regulations by means of Legal Notices rather than amendments to the Act proper is the preferred flexible method chosen to maintain the Act up to date with any changes that may be required, including the coming into force of EU directives.

In the case of EIRA the process which will lead to the eventual publishing of the legal notice is a tripartite one as the draft legal notice is initially sent from the Ministry whose portfolio include Employment and Industrial Relations to a tripartite board, known as the Employment Relations Board (regulated by Section 3 of the Employment and Industrial Relations Act of 2002), which is composed of members from the social partners (i.e. employer's representatives and trade union executives) together with representatives of the government. Following several discussion sessions, the draft is amended and returned to the Ministry for final review. The Directive has been implemented in Malta through this process by means of a Legal Notice which has the force of Law.

1.3 The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

In accordance with Article 78 of the SCE Regulation, the EU Commission was informed that the designated competent authority within Article 7, 29, 30, 54 and 74 is the Cooperative Board in Malta (Interview 23rd December 2009). This Board, set up in accordance with the provisions in the Cooperatives Societies Act, is assigned extensive powers and functions intended to enable it to play the central role in the supervision, performance, conduct and promotion of the cooperative movement.

While it is operationally independent, the Board relies on the Minister whose portfolio includes the operations of cooperatives.[140] This Minister is responsible for the appointment of the members of this Board as well as its funding and political support. The Board may only receive written general directions of policy from the Minister who may not intervene in decision affecting the operations of particular cooperatives. However the Board is obliged to furnish the Minister with all available relevant information to enable him/her to exercise his/her powers. Overall the Board plays three fundamental roles in order of importance: regulator, registrar and facilitator. Section 3 of this report will elaborate on the functions of this Board.

The implementation of and the fines levied for breaches of the Maltese Regulations in Legal Notice 48 of 2007, transposing Directive 2003/73/EC with regards to involvement of employees, fall under the jurisdiction of the Director of the Department for Employment and Industrial Relations.

1.4 Essential bibliography

Kummissjoni ghat-Tishih tal-Koperattivi '*Rapport Lill-Ministru ghall-Politika Socjali'* Malta; Ottubru 2009*

Ministry for Justice and Home Affairs *www.justice.go.mt*

Companies Act. Chapter 386 of Malta Laws

Cooperative Societies Act. Chapter 442 of Malta Laws

Employment and Industrial Relations Act (EIRA) (2002) Chapter 452 of the Laws of Malta

Ministry for Social Policy

Legal Notice 48 of 2007 Employee Involvement (European Co-operative Society) Regulation of 2007 www.msp.gov.mt

*****Commission for Strengthening of Cooperatives '*Report to the Minister of Social Policy'* October 2009

2. Commentary

The Board of Cooperatives in its bulletins and newsletter stated that the EU SCE Regulations can provide an opportunity for Maltese co-operatives to expand. The possibility of registering an SCE in Malta can create a scenario which represents a radical break with the sheltered mentality that has prevailed for many years among Maltese cooperatives. To achieve this objective Maltese cooperatives have to overcome their

[140] At present (September 2010) Parliamentary Secretary for Small Business and Land within the Ministry of Finance, the Economy and Investment.

insularity in order to be able to collaborate effectively across member states. A cross national model demands a cultural change in Malta where cooperatives, particularly those in the agricultural sector, which have for long time been the dominant sector in the Maltese Cooperative Movement, should cease seeking protection from domestic and international trade competition (Delia,2006:89). Such a lucid understanding of the forms of organisations involved is still lacking. Hence there has not been positive response or enthusiasm to the setting up of SCEs.

A report by Kummissjoni ghat Tishih tal-Koperattivi[141] set up by the Minister of Social Policy in 2009, recommended the launching of a scheme which would give aid in form of grants to cooperatives which submit a Business Plan to expand their operations in partnership with other cooperatives in EU member states or other European businesses (Kummissjoni ghat-Tishih tal-Koperattivi, 2009:41) However in the report there is no reference to the SCE Regulations.

To date (April 2010) there has been no registration of an SCE. The Cooperative Board has not received any requests for the formation of or registration for SCE. As such there has not been a case law which can identify any contentious issues which may arise between the provisions of the Co-operative Societies Act (Chapter 442 of the Malta laws) and SCE Regulation. Cross border activity in a small island sovereign state such as Malta has been at a premium. It should be noted that Malta is one of the few EU member states where no European Company has been registered under the Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE).

Even the transposition of the EU Directive 2003/72/EC into Maltese law supplementing the statute for a European cooperative (Legal Notice 48 of 2007) failed to generate a debate on a national level or among the social partners. Workers' participation and workers' involvement are not on the agenda of trade unions and the political parties. Moreover since there is no legal framework for institutionalised bodies for such practices at the place of work, these provisions in the EU Regulations are perceived to be procedural rather than substantive issues. As such there were no contestations.

By and large the transposition of the Directive is a good one. The reference to the national legislation in particular to the Employment and Industrial Relations Act (EIRA) is very clear. There are few if any areas of discrepancy between the Maltese Regulations and the Directive. However the Maltese legislators tended to stick to the minimum requirements set out in the Directive without making any effort to use the power to issue any additional rules which the Directive gives to member states. They did not transpose some substantive features of the Directive such as the principle of the adaptation of the representative body to changes which may occur in the perimeter of the SCE and its subsidiaries and establishments. Another instance is the lack of a provision, which is an option in the SCE Regulations, to promote gender balance in the composition of SNB.

[141] Commission for the Strengthening of Cooperatives

3. Overview of Maltese Cooperative Law

3.1 Sources and Legislation Features

The principal legislation governing co-operative societies in Malta is the Co-operative Societies Act which was passed in Parliament in 2001. This Act repealed and replaced the Co-operative legislation that preceded it namely the Co-operative Societies Act of 1978. This Act is a special law which provides a comprehensive legislation on the constitution, registration and control of all types of cooperatives. In other words it applies to all cooperatives seeking to establish themselves in Malta. It governs the establishment, legal status, management and dissolution of co-operative societies in Malta, whatever their activity or membership. Although not detailed and voluminous as the Companies Act (Chapter 386 of the Malta Law), it is still a quite comprehensive law which manages to deal with the most important issues.

It is divided into 11 parts. Part 1 contains preliminary provisions. Part II regulates constitution, functions and composition of the Cooperative Board, the body which is vested with the power to register, control and supervise the operations of cooperatives. Part III consists of provision for the formation and registration of cooperative societies, whereas Part IV provides for their organisation and duties. Part V regulates the rights and duties of members, while Part VI provides regulations governing the operations of management and societies. Part VII deals with property and funds of societies, Part VIII with amalgamation of societies, Part IX with dissolution and liquidations of societies, and Part X with constitution functions and duties of apex organisation. Finally Part XI contains miscellaneous provisions.

3.2 Definition and aim of cooperatives

The aim of the cooperative is the promotion of economic and other interests as spelled out in Article 21 (1) wherein a society is defined as an

Autonomous association of persons united voluntarily to meet their economic, social and cultural needs and aspirations, including employment, through a jointly-owned and democratically-controlled enterprise, in accordance with cooperative principles, and which, subject to the provisions of this Act, may be registered by the Board as a cooperative society under this Act.

The principles referred to in this definition of cooperative are articulated in a forceful and detailed manner in the following sub article – Article 21 (2). These principles, espoused by the pioneers of the cooperative movement and defined and adopted by the International Cooperative Alliance (ICA) are: Voluntary and Open Membership; Democratic Member

Control; Member Economic Participation; Autonomy and Independence; Education, Training and Information; Cooperation among Cooperatives, Concern for the Community. These principles are not enforceable in any court or tribunal,

but shall be adhered to in the interpretation and implementation of this Act and of any regulations made there under- Article 21 (3).

3.3 Activity

The board referred to in Article 21 is the Co-operative Board whose functions include the registration, monitoring of cooperatives as well as the exercise of "supervision over cooperative societies and to ensure compliance with the provision of this Act" – Article 3 (1). On registration the cooperative becomes a legal personality and as a corporate body it is vested with the

"power to hold movable or immovable property, to enter into contracts, to sue and be sued and to do all things necessary for the purposes for which it is constituted" (Article 31).

This means that like any registered company a cooperative can acquire and hold property, enter into contracts and engage employees.

The Cooperative Societies Act of 2001 sets out a revised updated framework to govern the formation, the management and closing down of cooperatives, without revealing any particular interest in the actual underlying economic activity undertaken by the societies themselves. "With this approach, the Act has shifted closer to company law. Cooperative and Company laws share a common concern to restrict the abuse of the corporate form and to promote minimum good governance. Beyond these concerns, the two laws are broadly reluctant to delve into the actual commercial activities carried out by the entities they regulate" (Fabri, 2006:9). In other words while making provisions for the Cooperative Board to act as a registrar for Maltese cooperatives, the Act of 2001 does not assign the task to this Board to monitor the actual performance of the cooperative.

3.4 Forms and modes of setting up

In the Preliminary provisions in Part I of the Act, 'society' is defined as co-operative society registered or provisionally registered under this Act and includes a primary society, a secondary society and a tertiary society. Primary society is defined as one "in which a majority of members are individual persons" whereas in a secondary "a majority of members are themselves primary societies" Tertiary society means a cooperative society in which a majority of members are themselves primary and, or secondary societies.

The founding members after determining the type of society they wish to form have among other things to make an assessment of the probable membership and expected volume of business, undertake a feasibility study, prepare a viability statement for submission to the Board, and compile a list of prospective members and a record of the probable capital contributions in the form of shares – Article 23.

Cooperatives are to be known by the name under which they are registered which must include the word “co-operative” or its abbreviation “coop” (Article 24). No person other than a society registered with Board of Cooperatives shall trade or carry on business or otherwise operate in any field under any name or title of which the word ‘Co-operative’ or ‘Coop”, or any other abbreviation or derivative thereof, is a part, without the written authorization of the Board – Article 3 (18).

3.5 Membership

Registration of a primary society with the Board of Cooperatives entails a minimum of five founding members – Article 22(2). To qualify as a member the person must be over 18 years of age, is not an undischarged bankrupt and satisfies such other requirements with regard to residence, employment, profession or other matter as may be prescribed by the statute - Article 53(1). The founding members or their duly elected representatives will be deemed to have all the powers and duties of a committee of management and shall serve in this capacity as members of the committee until a general meeting is held in accordance with statute of the cooperative. The statute of a cooperative may specifically permit a commercial partnership to qualify for membership provided that the operations of the commercial partnership are wholly or mainly similar or equivalent to the operations of the society- Article 53(2).

In the case of secondary cooperative the founding members consist of at least two primary societies whereas for the tertiary society the founding member consists of at least two societies of which at least one is a secondary society - Article 22 (b) and (c). The aim of secondary and tertiary societies is to facilitate, co-ordinate, promote and enhance the joint operations of those societies which are their members (Article 33).

Voluntary and open membership is laid down in Article 21 (2) as one of the seven principles which are to serve as guide lines to the operations of Maltese cooperatives. This article states that

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

In accordance with this principle the Act makes provision for new members to be admitted. If the person’s application for membership is refused such person may appeal to the general meeting of members and in any case he may be admitted as a member by a

resolution passed by not less than two thirds of the members present and voting at such a meeting – Article 52 (2). A member must not have a conflict of interest in the sense of being a member of another primary society having the same or similar objectives or activities – Article 55 (1). A cooperative society may include in its statute a clause permitting commercial partnerships to qualify as members of the society provided that

The operations of the commercial partnership are wholly or mainly similar or equivalent to the operations of the society Article 53(2)(a).

3.6 Financial profiles

A cooperative may not issue bonds or debenture without the authorisation of the Board. The act is very explicit about the maximum share capital which a member may hold.

Notwithstanding anything which may be contained in the statute of a society, no member shall hold more than forty per cent of the share capital of any society (Article 57).

In the case of a secondary or tertiary society a member which in is itself a cooperative society may hold more than forty per cent of such share capital (ibid).

The Act does not make a minimum capital requirement for the establishment of a cooperative. Every application for registration of a cooperative is considered on its own merits. Article 29 (2) puts the onus on the board in its deliberations during the approval process of the registration of a cooperative to ensure

that the proposed cooperative is likely to be viable and that the proposed management of the cooperative is appropriate" - Article 29 (1).

Moreover the founding members of the cooperative in submitting their application for registration have to "undertake a feasibility study into the economic and practical aspects of the activities to be carried out by the proposed society" - Article 13 (c). The Board may require the submission of a viability statement – Article 23 (d).

The Co-op Act contains provisions about the way the profit (surplus) is to be distributed amongst the members. The word profit does not feature in the Act. Surplus is defined as:

the net income less expenditure immediately before adequate provisions have been made from the Central Cooperative Fund and Reserve fund

It stipulates that at least twenty per cent of the surplus be transferred to a reserve fund at the end of each accounting period (Art. 90). This fund is to be used exclusively to cover losses incurred by the society and shall be kept in the form of liquid assets. Every co-operative is also bound to contribute five per cent of the surplus resulting from its activities, operations, investment and other sources at the end of each accounting period to a Central Co-operative Fund which is used for the furtherance of co-operative education, training, research and for the general development of the co-operative movement in Malta (Article 91). This fund is administered by a Committee set up by Legal Notice 60 of 1993

entitled ‘Co-operative Societies (Central Co-operative Fund) Regulations’. This Legal Notice provides for the establishment and functions of the Central Co-operative Fund Committee, composition of the Committee, judicial representation and procedure of the Committee, Central Co-operative Fund Bank Account, payments from the Fund, accounts and records, audit of the Committee, functions of the general meeting and communication by the Committee and to the Committee

The net surplus of a society after these two aforementioned transfers have been made may be divided among its members by way of dividend (Art. 92 Co-op Act). Any part of the remainder of its net surplus may be distributed to its members by way of patronage refund. Patronage Refund is defined as “*the distribution of all or any part of the net surplus or a society, paid among its members in proportion to the volume of business or other transactions done by them with the society”*

Not later than five months after the close of each financial year, a society is bound to submit to the Cooperative Board two certified true copies of the audited financial statements of the society, one of which is for public inspection – Article 48 (1). The auditor is bound to “inform the Board and the society or any of its officers, of any material irregularity disclosed in the course of his audit. Moreover

> *the auditor may at any time report to the Board and to the society upon any matters arising out of the performance of the audit – Article 49(6).*

3.7 Organisational profiles

The Act regulates in some detail the manner a cooperative is to be internally organised and managed. It lists the various organs which have to be set up and their respective functions, as well as the number of official posts that have to be filled and the respective duties attaching thereto. The Act makes provision for a Committee of Management, roughly comparable to the board of directors of a company. The board of directors is a mandatory organ under company law as the committee of management is mandatory under co-operative law. In accordance with Article 71 (2) of this Act members of this committee

> *shall be elected, suspended or removed only by a majority of members or delegates present and voting at a general meeting of the society.*

The Cooperative Societies Act of 2001 gives the registered cooperative the option of adopting a monistic governing structure or a dualist type of governance with a second-tier oversight supervisory board. Thus, the supervisory board which under the previous Act was mandatory, is now optional The locally registered companies have invariably adopted the single-tier management system consisting of a board of directors operating under the name of a Committee of Management as prescribed in the Act as most co-operatives are too small to warrant or sustain a double layer structure of management.

In accordance to Article 72 of the Act, membership of society is pre requisite for election to the management committee of the cooperative. It states that :

An individual shall be eligible for membership of the committee of management of a society or to remain a member of the society if he -

(a) is member of the society

(b) is an individual appointed in writing by a commercial partnership which is a member of the society

The Commission for the Strengthening of Cooperatives suggested an amendment to this article so as to allow cooperatives to be run by more professional or as stated in the report by a majority of members who are 'fit and proper' (Kummissjoni ghat-Tishih tal-Koperattivi, 2009: 42). Such an amendment would of course compromise the democratic principles of cooperatives. The rationale of the commission is that cooperatives have to be efficient and cost effective like private firms. To reach this aim they have to be managed professionally.

In line with its principle of democratic control the Act ensures equity in the voting rights of the members of cooperatives. Unless the statute of a society provides otherwise, each member of a primary society shall only have one vote in the affairs of the society, including a general meeting, irrespective of the number of shares he holds, and the right to vote shall be exercised in person and not by proxy. The granting of a proxy shall be in written form, and a proxy may not represent more than two members at a meeting, including the member exercising the proxy - Article 56 (1).

The Act expects high standards of performance from cooperatives and their officials. Towards this end, the law lays down several stringent rules relating to proper record-keeping and the need to adopt proper management and reporting systems and procedures. Proper financial statements are to be prepared annually and submitted to a proper audit carried out by qualified professionals (Articles 45 & 46). The obligations of every cooperative are highlighted in Article 48. Every cooperative has to keep "proper accounts and records of its transactions and affairs", to ensure that all payments are 'correctly made and properly authorized" and that the society's assets are properly safeguarded. As has already been stated, these provisions relating to accounting and audit obligations introduced in the 2001 Act have brought cooperatives regulations closer to the rules of the company law (Fabri,2006:25).

3.8 Registration and control

A cooperative society has to be registered with the Co-operative Board, which according to the provisions of this Act, is a statutory body having a distinct legal personality. The functions of the Board, listed in Article 3 (1) of the Act, are threefold namely:

(a) to register, monitor and exercise supervision over co-operative societies and to ensure compliance with the provisions of this Act

(b) to support and assist the establishment of co-operative societies in all section of the economy and society

(c) to furnish information regarding co-operative principles, practices and management.

The board besides acting as the registrar of cooperatives, is also the keeper and custodian of a publicly registry, designated the Registry of Co-operative Societies. The register of cooperatives societies as well as the registered statute of every society with any registered amendments thereto, and the audited financial statements of societies shall be open to inspection by the public during such time and against payment of such fees as the Minister shall from time to time prescribe by regulations under this Act (Article 12). Even the updated list of the society's members, which should be submitted to the Board every year, shall be open to inspection to the public at the office of the Board. The cooperative society is bound to keep open to inspection to its own members, free of charge, at all reasonable times a duly copy of its statute, a copy of the Act, and a list of members (Article 39).

The board is composed of a chairperson and of not less than two and not more than six other members who are all appointed by the Minister under whose portfolio cooperatives fall. In order to emphasise the fact that his board is not merely an ad hoc body for holding occasional meetings to discuss topical issues the Act states that:

There shall be an office of the Board which shall be managed and staffed in accordance with the provisions of this Act – Article 6(1).

Compliance with this Act is emphasized. The 2001 Act requires an auditor to certify that the society has complied with the provision of this Act. The audit is not limited to the financial aspect as Article 49.4 (d) makes it amply clear that audit exercise is more than a verification of numbers and figures. According to this article besides ensuring that proper accounting records have been kept and the society's account are in agreement with the accounting records and returns he is also expected to investigate whether

The society has functioned in accordance with its statute and the provisions of this Act (Article 49.4 d)

It implies that the auditor should be fairly knowledgeable of the provision of the Act and consequently expects him to report evidence of corporate fraud and other material wrong-doing.

The Minister may make regulations authorizing the Board to impose administrative fines or sanctions on any society or officer thereof, of an auditor of a society, in the event of any breach of the provision of this Act or of any regulations issued thereunder, or of and order lawfully issued by the Board by virtue of its powers under this Act. This power to impose fines enables the Board to impose a degree of order in the area of statutory jurisdiction.

The Board is also empowered to suspend or restrict all or any of the activities of the society and even remove its Committee of Management if, after an inquiry is held, it is not

satisfied that the society or its Committee of Management is not performing its duties properly (Article 20). Given that Maltese cooperatives, like Maltese companies, tend to adopt a one tier basis for their operations, which means that there is no supervisory board, this power granted to the Cooperative Board to remove Managing Committee and restrict activities of a cooperative is relevant. An SCE with a registered office in Malta would have to operate in accordance with the provisions of this Act and as such this power would apply accordingly.

The cumulating roles/functions of the cooperative board do not cause problems. The board is not comparable to a Registry of companies under the Companies Act. Its additional roles to that of Registrar, namely regulator and facilitator, have hardly ever been questioned. The spirit of cooperativism may not always act as a guiding spirit to the operations of cooperatives. Thus the over arching powers of the board may be instrumental in ensuring that the Maltese cooperatives are not distancing themselves from the principles underlying the operations of cooperatives. The Commission for the Strengthening of Cooperatives stated that it is not in a position to suggest that cooperatives, like commercial companies, should be allowed to operate according to their own devices (Kummissjoni ghat-Tishih tal-Koperattivi,2009:23).

3.9 Transformation and conversion

A cooperative society may have a subsidiary company provided that the objects of this company serve to fulfil, promote, complement or advance the objects of the parent society

Article 22 (3). This provision, which did not feature in the previous Act, makes it possible for a cooperative society to become 'parent society' by establishing such a subsidiary company. This new rule seeks to extend, in a sensibly restrained manner, the range of commercial opportunities and arrangements that co-operatives can now enter into (Fabri, 2006:18). Provisos are made in Article 22 (3) of the Act which states that:

It shall be lawful for a parent society to have a subsidiary company, provided the following conditions are fulfilled:

(a) the objects of the subsidiary company serve to fulfil, promote, complement or advance the objects of the parent society

(b)adequate measures are in place to ensure that the members of the parent society are kept adequately informed of the operations and performance of the subsidiary company; and

(c) adequate measures are in place to ensure that the powers of the parent society with respect to the subsidiary company are exercised, having due regard to the wishes of the parent society.

Article 108(4) of the Act confers to the Minister the power to make regulations establishing the procedures and other requirements whereby:

(a) a commercial partnership may be converted into a society

(b) a society may be converted into a commercial enterprise.

This article makes reference to the relevant article in the Companies Act. However these articles do not yet make any provisions of or give recognition to the conversion of a commercial partnership into a cooperative of other entry not regulated by the Companies Act. This means that the appropriate amendments to the Companies Act would have to precede the issue of any such regulations (Fabri, 2006:18).

3.10 Specific tax treatment

Article 12 (q) of the Income Tax Act, 1948 (Chapter 123 of the Maltese Law) exempts the income of co-operative societies from the payment of income tax. This article entitled 'Exemptions' comprises a long list of entities, such as universities, philanthropic organisations, political parties etc, which are exempt from tax. Cooperatives are included among this list in section 'q' of this article. The exemption may be defined as specific in the sense that it makes cooperatives distinct from companies registered under the Companies Act with regards to tax treatment. Nevertheless, distributions to members of the co-operative,[142] bonus shares or certificates,[143] and patronage refunds[144] are all subject to the members' full personal rate of income tax.

3.11 Existing draft proposing new legislation

There is no existing draft proposing new legislation. In terms of the Budget speech - 2009 - a Commission was appointed by government to submit ideas and suggestions for strengthening the cooperative Movement in Malta. The report was submitted to the Minister of Social Policy in December 2009. The recommendations made by this Commission were the following:

- Setting up of a support agency to help the cooperative in training, organisation and management
- Setting up of an Evaluation Unit to conduct a continuous evaluation of the operations of cooperatives
- the inclusion in the Annual Report of a social audit outlining the operations of cooperative in relation to the principles of cooperativism .
- Setting up five schemes : Advice Services, Initiatives and Research Project,

[142] By way of dividend.
[143] Fully or partly paid shares allotted to the members.
[144] In terms of Art. 93 of the Co-op Act, Co-operatives may grant patronage refunds. These are where the society distributes all or any part of the net surplus of the society, paid among its members in proportion to the volume of business or other transactions done by them with the society.

- Cooperatives in Community, Pilot Project of Credit Unions, European Dimension.
- Taking measures to ensure level playing field when cooperatives are competing for public tenders
- The Apex organization , 'Koperattivi Malta', retains its rights to nominate a member on the Committee of the Central Fund.
- There should be not more than one person who is both a member of the Cooperatives Board and of the Board of Committee of the Central Fund.
- A minority of the members of the Management Committee of cooperatives should be outsiders i.e. non-members
- Setting up of a Standing Tripartite Forum to coordinate the separate functions of the Cooperatives Board, Koperattivi Malta (the Apex organisation) and the Central Fund Committee.
- Change in the local regulations about accountability so that cooperatives, which are small in size, can follow the General Accounting Principles for Small Enterprises (GAPSE) rather than the International Accounting Standards (IASs) as approved by the EU Kummissjoni ghat-Tishih tal-Koperattivi 2009: 43-45.

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*Most of the critique in this report is derived from this paper. The author of this paper, who for a long time was a member of the Cooperative Board, is a lawyer. Cooperative law is one of his special fields of studies.

** Commission for Strengthening Cooperatives '*Report to the Minister of Social Policy'* October 2009

4. SCE Regulation and national law on cooperatives

In terms of Article 78 of the SCE Regulation obliging member states to make provisions as is appropriate to ensure the effective application of this Regulation, the Co-operative Societies Act of Malta seems to provide most of the legal instruments for such an effective implementation. For this implementation to be effective Article 78 of the SCE Regulation refers to the adequate provisions in the law of the member states relating to (i) Scrutiny of Merger Procedure and Legality; (ii) Holding of General Meetings; (iii) Publication of Winding Up and Insolvency and (iv) Transfer of Registered Office

Scrutiny of Merger Procedure and Legality

The Scrutiny of legality of merger in Articles 29 and 30 of the EU Regulation is provided for in Part VIII of the Act under Amalgamation of Societies. Article 95 of this Act states:

Subject to the provisions of this Act, any two or more societies may by instrument in writing amalgamate into a single society if each of such societies has so resolved, by a three-fourths majority of the members present and voting, at an extraordinary general meeting held for the purpose and for which a notice in writing, containing the

resolution and giving the date and place of the meeting, has been given at least fifteen days before the meeting is held.

The application for the registration of this new society is scrutinised by the Board of Cooperatives in terms of Article 26 and 29 of the Act which spell outs the rules and procedures to be followed in the submission of the application. One of these rules laid down in Article 26 is that in the case of a primary society the application has to be signed by at least five persons, in the case of a secondary and tertiary societies by individuals duly authorized in that behalf by not less than two societies qualifying for membership of secondary or tertiary, as the case may be, and which are prospective members of the society. In terms of Article 209 the applicant has to satisfy the Board "that the proposed cooperative is likely to be viable". Upon full registration the Board shall issue an appropriate certificate of registration and shall cause the fact of registration to be published in the Gazette.

The same criteria apply for a registration through an amalgamation by merger in Article 96 of the Act which more or less contain the same wording of Article 95 and lays down the same rules and procedures. The Act also makes a provision for the dissolution and winding up of the society or societies which as a result of an amalgamation would cease to exist. The newly formed society shall succeed to all assets, rights, and liabilities or obligations of the society or societies ceasing to exist by virtue of the act of amalgamation (Article 97).

The amalgamation of societies and the transfer of the assets and liabilities of society to another society shall be effected after the expiration of three months, or such shorter period as the boards may, in exceptional circumstances, allow for the publication in the Gazette if a notice by the Board, containing the general particulars of the intended amalgamation or transfer. During this transitory period a creditor may object to the proposed amalgamation or transfer. In order to proceed, the Board has to be satisfied that the proposed amalgamation or transfer

"*shall not adversely affect the legitimate interests of the said creditor and that significant guarantees would remain for the settlement of the legitimate claims* "

Article 99(2).

A member of an amalgamating society or a transferor society has a maximum of two months to declare his intention not to become a member of the new society – Article 99(3).

Holding of General Meetings

The Maltese Act states that the supreme authority of a society shall vest in the general meeting of its members which every member shall have the right to attend and vote in person or by proxy (Article 62). Within six months from the date of its registration, every society shall hold a general meeting during which there is an election of the officers who are to serve until the first annual general meeting (Article 64). Every society shall provide in its statute for an annual general meeting to be convened by the committee of

management and to be held as soon as practicable, but not later than six months after the end of each financial year (Article 65). The functions of the annual general meeting listed in the following article (Article 66) are: consideration or confirmation of amendments, consideration of reports by auditor, committee of management or report made by the Board; approval of financial statements; determination of distribution of available net surplus; proposals about honoraria, allowances, audit fees, and/or other remuneration; election of members of committee of management; appointment of auditors; decisions on appeal for membership; maximum amount the society borrows, hearing of and decision of complaints; transaction of any of the general business of the society which due notice has been given to members.

The Act also makes a provision for a further meeting to be convened by stating that an extraordinary general meeting of a society may be convened at any time by the committee of management. The Committee is bound to convene such a meeting if one fourth or fifteen of the members or delegates of the society, whichever is the less, make a request for such a meeting (Article 67).

Dissolution and Liquidation

As regards dissolution and liquidation, provisions are made in Article 100 to 105 of the Act. In the dissolution of a society the Board

"shall consider the interests of the members, creditors and employees of the said company" (Article 100).

In terms of this article the decision about the dissolution of a society can be taken by the Board on its motion or following a resolution passed by three-fourths majority, or such higher majority as may be stipulated in the statute. The Board shall appoint a liquidator for the purpose of winding up the affairs of the society. Upon the appointment of a liquidator by the Board, all the powers and functions of the committee of management, or of the supervisory board, if any, shall cease – Article 100 (7). However the liquidator shall exercise his powers subject to the supervision of the Board (Article 102). The enforceability of the order is provided for in Article 103 which states that:

An order made by a liquidator and ratified in writing by the Board shall be enforceable by the Civil court or by the Court of Magistrates (Malta) of the Court of Magistrates (Gozo), in its superior jurisdiction as if it were a judgement of that Court. (Article 103).

Transfer of Registered Office

The Act is silent about the transfer of registered office which is also listed in Article 78 of the SCE Regulation. Given the well-defined provisions laid down in the Act about the registration of cooperative, this omission may not constitute a hurdle for the establishment of an SCE. Most of these provisions are in accordance with standards rules in other countries and in line with the principles espoused by ICA. In general, Maltese law provides a mechanism which ensures a smooth transition when there is a transfer of the registered

office to Malta (Vella, 2006:107). Nevertheless in the eventuality of a setting up of an SCE with the involvement of a Maltese cooperative, the lack of a provision in this regard may raise contentious issues. It is a shortcoming which the law should address.

Workers' Participation

As regards the Council Directive supplementing the statute for a CSE with regard to the involvement of employees it has to be noted that in the Companies Act and in the Cooperative Societies Act there are no provisions for any institutional form of workers' participation at enterprise or undertaking level. The democratic principles espoused in the Co-operative Act apply to persons in their capacity of members and not as workers. Thus workers employed by cooperatives are not subject to any specificities in their contractual relationship that are different from those of other Maltese wage-earners. In other words their employment relations are governed by the same rules laid down in the Employment and Industrial Relations Act (EIRA) which does not make any provisions for workers' participation schemes or instituted bodies to this effect.

Impact

Overall SCE Regulations have had no impact on the national legislation on cooperatives in the senses that no amendment, inspired by these Regulations, have been made to the Cooperative Societies Act. The Maltese law governing the operations of Maltese cooperatives is by and large compatible with the provisions of the SCE Regulation. However the lack of reference in the SCE Regulation to the principles underlying the operations of cooperatives has caused some concern among the members of the Maltese Cooperatives. These principles espoused by the pioneers of the cooperative movement and unequivocally affirmed, more than forty years ago, by the ICA, may of course be given the cold shoulder by the officials and/or members of the Maltese cooperatives. Indeed the reluctance shown by some cooperatives to contribute to the Central Cooperative Fund (see 1.7 of this report) may indicate the absence of a strong belief in the principle of solidarity which is one of the aims for the setting up of this fund. There has been a case where a cooperative contested its obligation to contribute to this fund and referred its case to arbitration claiming that this mandatory contribution constitutes an additional tax. This claim was not upheld by the Arbitration Tribunal.

These principles have also been questioned by Maltese writers. A leading Maltese economist has recommended that in order to make cooperatives more consonant with the entrepreneurial elements of the competitive market, amendments should be made to the voting system in the decision making process of the cooperatives which is based on the democratic principle of one member one vote (Delia, 2006:81). However there seems to be no room for compromise on this point neither from the Cooperatives Board nor from cooperatives members who still insist that this is a basic principle of the cooperative movement. Thus no changes are likely in this regard.

The Act, enacted in 2001, "has taken great pains to endow these principles with a higher status and to make them more effective in practice. The law now requires them to be respected and adhered to by all persons applying and interpreting the provision of the Act. Co-operatives and their controllers are now required to consider these extraordinary principles as fundamental to their policies and day-to-day co-operatives activities. In this sense, it appears safe to suggest that the co-operative principles, now enjoy a freshly enhanced status, and certainly no longer a vague mission statement. Whether this is sufficiently understood or applied in practice, is of course a moot point" (Fabri, 2006: 13-14). In the context of the concerns raised by the Malta Board of Co-operatives the affirmation of these principles may be one of the fine-tuning exercise which needs to be made in the SCE Regulation when it comes for revision.

Obstacles to Development

The lack of support agencies or institutions which support the setting up and sustainability of the cooperatives has been one of the handicaps for the growth of the cooperative movement in Malta. The history of cooperatives reveals that political parties, trade unions and the dominant Catholic Church, in spite of some sporadic initiatives[145], have hardly shown a serious commitment to the setting up of cooperatives (Baldacchino, 1990:105; Rizzo,1994:115-116; Millns, 2006:134). Cooperatives in Malta owe their origin to the initiative of the colonial government in 1946 which enacted the Cooperative Societies Ordinance of 1946. Maybe this is one of reasons why the Cooperative Board has assumed such a paternalistic and patronising role in the running of cooperatives. Indeed the board besides its role of registration and monitoring carry out such activities as education, training research and consultancy services.

The lack of entrepreneurial ability and management skills has often been highlighted as one of the contributing factors for the capital constraints from which many Maltese cooperatives tend to suffer (Millns, 2006:134). They may still have to develop that entrepreneurial acumen that would enabled them to respond speedily to business cycles in a free trade environment (Delia, 2006:83).

[145] The Social Action Movement - a body with close affinities with the Maltese Catholic Church and pioneered by a Catholic diocesan priest initiated some ventures in this field. In 1980's on the initiative of a politician who later assumed the leadership of the Malta Labour Party, two cooperatives were formed by workers declared redundant in the textile industry. None of these cooperatives have managed to survive. Trade unions have not played an active role in the setting up of cooperatives apart from their consultative and advisory role in the setting up of cooperatives among public sector employees some of which are still thriving.

NETHERLANDS

By Ger J.H. van der Sangen

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Introduction

The Netherlands has a long tradition in the development of highly competitive cooperatives in several areas of industry like dairy, potato and meat processing and agricultural service cooperatives and retail banking, as well as insurance. Cooperatives are also used for housing in condominium, health care and educational organizations. The current number of cooperatives in the Netherlands is declining vis-à-vis non-cooperative business forms. However, agricultural cooperatives and banking cooperatives show a stable increase in turnover and growth of the company. Over the past decades there has been a constant decline in the number of cooperatives registered in the commercial register. One reason for it is that the Netherlands' cooperative sector has evidenced a strong tendency towards concentrations and mergers. With regard to the agricultural sector, this is accompanied by a decline of the number of individual members, due to similar processes of concentrations and mergers of agricultural firms. On 7 April 2010, 4771 cooperatives have been registered in the Netherlands with the commercial register. However, a large number of these cooperatives, approximately 4000, are used for small firms or as special purposes vehicles. It concerns cooperatives with an ordinary and basic structure with a complete exemption of membership liability. The top 10 of agricultural cooperatives added with the Rabobank Group accounts for the majority of turnover and employees employed. These latter organizations are organized through the National Cooperative Council (NCR) in the Netherlands.

According to the findings of a research into the database of the National Chamber of Commerce, combining all available data of the commercial registers in the Netherlands on cooperatives and SCEs, at this moment (26.04.2010), only one SCE has been registered

at a commercial register in the Netherlands. Although SCEs according to Netherlands law are established by a notarial deed, SCEs have to register at a commercial register in order to obtain legal personality. Since only one SCE has been established according to Netherlands law, the SCE as a new business form therefore appears to be unsuccessful in the Netherlands until this moment.

1. The implementation of the SCE Regulation 1435/2003 in Dutch legislation

1.1. Source, time and modes of implementation

The Council Regulation on the Statute for a European Cooperative Society (SCE) has been implemented in the Netherlands by the Act of 14 September 2006, Staatsblad 2006, 425, becoming into force on 13 October 2006 by Royal Decree (Staatsblad 2006, 456). As an appendix, enclosed are the Netherlands text of the bill and a literal translation of the act implementing the SCE Regulation in English. This act (hereinafter: the Implementation Act) contains a mere 26 Articles, 21 one of them providing material rules on the "Netherlands" SCE.

With regard to the position of employees, the Netherlands legislature chose not to pass a separate law on the matter in order to implement the directive on employee involvement in SCEs, but inserted the necessary provisions in the act implementing the SE-Directive of employee involvement. Enclosed is the Act Implementing Directive 2003/72/EC of 22 July 2003, OJ L207, leading to amendments of the Netherlands Act on the Involvement of employees in European Legal Persons ('Wet rol werknemers bij Europese rechtspersonen) (Staatsblad 2006, 361). This Netherlands act was initially passed to implement the SE-Directive on employee involvement. After the introduction of the SCE and the need for implementation of the SCE-Directive on employee involvement, the provisions related to the SCE were inserted into this act, in chapter 2. The act implementing the SCE-Directive was passed on 17 March 2005 and became in force on 18 August 2006 by Royal Decree (Staatsblad 2006, 362). This act generally follows the technique and procedures used for implementing the SE-Directive on employee involvement (consultation and information rights, the establishment of an SCE-Works Council and rules for preventing loss of pre-existing co-determination rights in case of the formation of an SCE). At this moment, there is no translation in English available for this highly technical and detailed part of the Netherlands SCE-legislation. Enclosed is the full text in Netherlands language.

1.2. Structure and main contents of the regulation

In the Implementation Act, the Netherlands legislature confined itself to implement the SCE Regulation as far as necessary. The provisions of the Implementation Act are rather concise. As a general rule, the Netherlands legislature refrained from additional lawmaking.

1.2.1. Mandatory implementation

Article 4 SCE-Re. with regard to considerations in kind has not lead to further implementation measurements.

With regard to article 7, paragraph 8 SCE-Re., Article 20 of the Implementation Act attributes the authority to issue a certificate to a notary registered in the Netherlands. This is in compliance with the Third Council Directive 78/855/EEC.

With regard to the registration and disclosure requirements referred to in article 11 of the SCE-Re., these requirements have been implemented in article 7 of the Implementation Act, designating the commercial register as the competent authority. The SCE is treated in this respect as a public company. Necessary amendments have been made in the Netherlands Act on the Commercial Register, providing for the obligation for the incorporators to register an SCE into the commercial register. Apart from this, establishing an SCE does not require additional registration or disclosure, save for those that would be involved in banking or insurance activities as mandated by the Netherlands Act on Financial Supervision. These cooperatives are placed under public oversight by DNB (banking supervisor) and the AFM (financial markets supervisor).

With regard to the independent expert for the merger, article 26 of SCE-Re. has not been implemented with any special provision. On the basis of article 4, paragraph 6 of the SCE-Re. and art. 22, paragraph 1, section b, the auditor monitors the exchange ratio. It is understood that the same rules and procedures apply as in the case of a legal merger (see Van Veen et.al. 2006, p. 167).

With regard to article 29, paragraph 2 and art. 30, paragraph 1 SCE-Re., article 20 of the Implementation Act attributes the authority to issue a certificate to a notary registered in the Netherlands.

With regard to article 35 SCE-Re. on the procedure for formation by conversion, a certified auditor monitors the exchange ratio and verifies whether the total assets and liabilities equal the shares attributed after the merger on the basis of article 10 of the Implementation Act.

With regard to article 70 SCE-Re., the Netherlands Implementation Act does not contain any additional provisions. It is understood that the rules of national cooperatives are applicable to SCEs established in the Netherlands, and therefore, auditing rules are

applicable to SCEs on the same footing as to national cooperatives on the basis of article 360, Second Book, Netherlands Civil Code.

The provision of art. 73, paragraph 1 SCE-Re. has been implemented in article 16 of the Implementation Act, reading: “In the cases referred to in article 73, paragraph 1, of the Regulation, a European Cooperative Society with registered office in the Netherlands will be dissolved by the court on application of any person with a legitimate interest or of the public prosecution service. Before declaring the dissolution, the court may allow the company time to rectify the situation within a specific timeframe set by the court.”

The provision of article 73, paragraph 2-6 has been implemented in article 17 of the Implementation Act, reading: “A European Cooperative Society with statutory seat in the Netherlands will be dissolved by the court on the request of the public prosecution service, in case the central place of administration is not seated in the Netherlands. Before proclaiming the dissolution, the court may grant the European Cooperative Society the opportunity within a timeframe set by the court to transfer the central place of administration towards the Netherlands or to transfer its statutory seat in accordance with article 7 of the Regulation.”

The provision of article 76, paragraph 5 SCE-Re. has been implemented in article 19 of the Implementation Act, reading: “The European Cooperative Society with registered office in the Netherlands that has drawn up a proposal of conversion into a cooperative in accordance with article 76 of the Regulation, submits the proposal at the office of the commercial register and announces the submission in a national gazette. An auditor referred to in article 393, paragraph 1, of the Second Book of the Civil Code shall certify, before the general meeting is held, that the European Cooperative Society to be converted into a cooperative has assets at least equivalent to its capital.”

With regard to article 78, paragraph 1 SCE-Re. (“member states shall make such provisions as is appropriate to ensure the effective application of this Regulation”), the Netherlands legislature refrained from any additional legislative measures or policy to foster or promote the application of this Regulation in practice.

With regard to article 78, paragraph 2 SCE-Re.: see section 1.3.

1.2.2. Facultative implementation

Below is indicated which optional provisions have been made in the Implementation Act. If no reference is made below, the Netherlands legislature did not consider to implement the other options through additional rules.

The option of article 2, paragraph 2 SCE-Re. has been implemented in article 2 Implementation Act.

The option of article 7, paragraph 14 SCE-Re. has been implemented in article 6 Implementation Act.

The option of article 14, paragraph 1, SCE-Re. has been implemented in article 8 Implementation Act. The Netherlands legislation on cooperatives already contained such a possibility in article 38, paragraph 2, Second Book, NCC. However, the adjudication of voting rights to non-using members for the cooperative is more flexible, e.g. restricted to one half of the total amount of the voting rights actually cast by members in the general meeting, while in case of the SCE it is restricted to a quarter of the total amount of the voting rights.

The option of article 21 SCE-Re. has been implemented in article 9 Implementation Act.

The option of article 37, paragraph 2, SCE-Re. has been implemented in article 11, paragraph 1 Implementation Act, giving the incorporators of the SCE the opportunity to provide in the articles of association that the members of the management organ will be appointed by the general meeting.

The option of article 37, paragraph 4, SCE-Re. has been implemented in article 13, paragraph 1 Implementation Act, setting the minimum number of members of the management organ at 3.

The option of article 37, paragraph 5, SCE-Re. did not need implementation since cooperatives in the Netherlands, if they choose for a supervisory organ, have to choose for a two-tier system. However, the legislature needed some provisions in order to implement the one-tier system. In this respect, the legislature stipulated that non-executive members of the one-tier board should be natural persons. See article 13, paragraph 3 Implementation Act. No additional rules with regard to the one-tier board were implemented.

With regard to article 42, paragraph 1, SCE-Re., there is no provision in the Implementation Act. However, this does not mean that a SCE will not be in the position to have a director, since on the rules for cooperatives provides this option, since board members need not be members. See under section 3.7.

With regard to article 47, paragraph 1, SCE-Re., the rules for representation applicable on the SCE are similar to the rules for cooperatives. A provision of this kind can be found in article 13, paragraph 2, SCE-Re.: “The articles 7 and 45 of the Second Book of the Civil Code apply to a European Cooperative Society with registered office in the Netherlands.” This means that the board as a whole has to represent the SCE. Individual members are allowed to represent the SCE if the articles of association provide for it. In the latter case, restrictions in the power to represent are enforceable towards third parties, but only if they are generic restrictions or within the scope of transactions summarized in article 45, paragraph 2, Second Book, NCC. A transaction with a third party may be found null and void because the transaction is evidently not suitable to benefit the objectives of the SCE and therefore considered to be a transaction “ultra vires”, like envisaged in article 7, Second Book, NCC.

The option of article 47, paragraph 4, SCE-Re. does not need implementation, for this issue is covered by article 45, paragraph 3, Second Book, NCC.

The option of article 59, paragraph 2, SCE-Re. was not implemented because the applicable law on cooperatives already provides for this option in article 38, paragraph 1, Second Book, NCC. However, if the articles of association of the SCE contain this option, the more restrictive limitations of the SCE-Regulation apply.

The option of article 14, SCE-Re. to introduce investor members has been implemented in article 8 Implementation Act. Although the Minister of Justice stated during the parliamentary sessions that it was not very clear whether or not according to current cooperative law cooperatives were already allowed to introduce non-using investor members, legal scholars are unanimous on this issue (see section 3.5.). By giving the provision in article 8 Implementation Act, the Minister of Justice solved the matter and gave the necessary legal certainty that according to current Netherlands cooperative law as well as SCE law the adjudication of voting rights to non-using members is admissible. However, the SCE Regulation contains a more restrictive provision than the current provision in article 38, paragraph 3, Second Book, NCC.

1.2.3. Scope of activities

The Implementation Act does not contain any restriction of the SCE with regard to the scope of their business activities. However, the SCE is viewed – although it follows the internal structure of a company with share capital – as a cooperative. The restrictions with regard to the nature of business activities applicable to cooperatives apply equally to SCEs in the Netherlands. An SCE is not allowed to pursue insurance activities. It is, however, disputable whether, according to Netherlands law, cooperatives and SCEs may pursue insurance activities through a fully owned subsidiary. We refer to section 3.2. and 3.3. for a description and analysis on this matter with regard to the Netherlands cooperative.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

As provided for by article 78, paragraph 2 SCE-Re., the following competent authorities were designated in the Netherlands:

- With regard to article 7, paragraph 2, articles 29, paragraph 2, article 30, paragraph 1 SCE-Re.: the notary. See article 20 Implementation Act.
- With regard to article 21 SCE-Re.: the Minister of Justice. See article 9 Implementation Act.
- With regard to article 54, paragraph 2 SCE-Re.: no additional designation has been made.
- With regard to article 73, paragraph 5 SCE-Re.: the head of the office of the Court of Appeal (ressortsparket) in Amsterdam. See article 21 Implementation Act.

1.4. Essential bibliography (in alphabetical order)

P.J. Dortmond, “De uitvoeringswet verordening Europese coöperatieve vennootschap (SCE)”, *Ondernemingsrecht* 2006-2, p. 44 e.v.

Title: “The implementation act Regulation European Cooperative Society (SCE)” – no English version available.

R.C.J. Galle, “De Societas Cooperativa Europea (SCE)”, *Tijdschrift voor Ondernemingsbestuur* 2006-1, p. 13 e.v.

Title: “The Societas Cooperativa Europea (SCE)” – no English version available.

R.C.J. Galle, “The Societas Cooperativa Europea (SCE) and National Cooperatives in Comparative Perspective”, *European Company Law*, December 2006, Vol. 3, Issue 6, p. 255-260.

R.C.J. Galle, “De Societas Cooperative Europea (SCE) en nationale coöperaties in vergelijkend perspectief”, in: G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (eds.), *De coöperatie, een eigentijdse rechtsvorm,* Boom juridische uitgever, Den Haag, 2007, p. 49-62

Title: this title is the Dutch version of the previous English title.

E.D.F. Kiersch & G.M. ter Huurne, “De Europese coöperatieve vennootschap (SCE)”, *Ondernemingsrecht* 2005-10, p. 346 e.v.

Title: “The European Cooperative Society (SCE)” – no English version available.

G.J.H. van der Sangen, “Grensoverschrijdende reorganisaties van coöperaties”, in: G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (eds.), *De coöperatie, een eigentijdse rechtsvorm,* Boom juridische uitgever, Den Haag, 2007, p. 63-84.

Title Chapter: “Cross-border reorganizations of cooperatives” in Title Book: *The cooperative, a contemporary business form* – no English version available

W.J.M. van Veen (red.), *De Europese Coöperatieve vennootschap (SCE)*, Serie Recht en Praktijk, deel 147, Deventer, Kluwer, 2006

Title: *The European Cooperative Society (SCE)* – no English version available.

2. A comment on the implementation of the SCE Regulation in Dutch legislation

First of all, it is worth mentioning that although the SCE Regulation seems very clear on the issue in article 78, paragraph 1, the Netherlands legislature did not take any measures at the national or regional level to support proactively the use in practice of either national cooperatives or the SCE as a business form. From the legislative historical accounts on the implementation of the SCE follows that the Netherlands’ legislature merely confined itself to implement the SCE Regulation and the Directives on the involvement of employees as far as necessary. No additional measures fostering and promoting

cooperatives and SCEs came to my knowledge. In the literature, article 78, paragraph 1 SCE-re. was not covered by any comment.

From the survey (questionnaire 2) conducted, we have only the experience of the Cassia-Coop SCE, established on 14 December 2009 in Amsterdam. The main reasons for the incorporators of Cassia-Coop SCE to choose the SCE were: 1) to benefit from the value of the European image and to use the European flag for this international cooperative chain of producers and suppliers and importers of exotic spices, and 2) the possibility to pay dividends to members in proportion to their business with the SCE or the services they have performed, which was the basic idea of the cooperative's business plan. However, the latter concept could also have been configured through a cooperative as well.

All interviews answered affirmative to the question whether they knew the purpose of the SCE Regulation and they were aware of the existence of the SCE Statute. Although the number of interviewees returning the filled-in questionnaire is rather small, they share the same overall opinion. According to the interviewees, the SCE is not commonly used because practitioners agree that the Netherlands regulation of the cooperative is more flexible. In this respect, almost all interviewees refer to the complexity of the SCE Regulation as well as the complexity of the rules for employee involvement. The absence of a specific tax regime is also mentioned by several interviewees: the SCE is treated as a public company concerning taxation and not as a cooperative, depriving the SCE from tax facilities for cooperatives. The special tax regime for cooperatives (see section 3.10) – though restrictive in its nature – is not applicable to the SCE.

A second reason that the SCE is not being used in practice may be based on the dichotomy between the national cooperative which follows the organizational structure of an association, which is relatively flexible, while the SCE follows a hybrid organizational structure of an association with components of a company with share capital.

Another reason reported was the fact that the SCE is governed by different layers of legislation and provisions in the articles of association. Combined with the complex rules for employee involvement, stemming from the Directive, the complexity and the references back and forth makes the SCE as business form inaccessible for practitioners vis-à-vis the well-known and flexible legal structure of the cooperative.

The benefits of the SCE would be mainly to facilitate cross-border legal mergers, seat transfers and cross-border cooperation with other cooperatives and/or SCEs from other member states. With regard to the facility of cross-border legal mergers, it seems that the demand for this facility is absent, in particular because the Regulation forces cooperatives wishing to merge to form an SCE. Note that in the Netherlands the implemented 10th Directive does not provide for facilities for cross-border legal mergers between a Netherlands cooperative and a cooperative from another member state. However, a Netherlands cooperative may act as an acquiring company in a cross-border legal merger on the basis of the European Court of Justice Sevic decision.

In summary, the “failure” of the SCE in the Netherlands is caused by the complexity of the SCE Regulation, the implementation measures, the mandatory and complex rules for employee involvement and the absence of a specific tax regime. Combined, it makes the SCE impractical, whereas – at the same time – it is not self-evident what the specific benefits of the SCE are in practice, while the national cooperative is considered to be very flexible.

3. Overview of cooperative law

3.1. Sources and legislation features

In the Netherlands, apart from “cooperative” insurance companies (mutual companies), there are no specific regimes for different types of cooperatives.

The primary source of legislation with regard to cooperatives is the Second Book of the Netherlands Civil Code on Legal Persons. However, there is no section in the code containing all the provisions with regard to the cooperative. The Second Book of the Netherlands Civil Code (NCC) contains provisions on legal persons in general. Several sections of this part of the Civil Code are relevant to cooperatives. Articles and provisions relevant to the cooperative as being a legal person in the meaning of the Second Book of the NCC can be found in Title 1, under the heading *General Provisions*. These provisions apply to all legal persons enunciated in article 3 NCC. In these General Provisions, you may find provisions with regard to the nullity of legal persons, rules on “ultra vires”-transactions, the attribution of legal personality and legal standing in proceeding, provisions on the procedure and annulment of resolutions of its bodies, the grounds and procedures for liquidation and winding-up, as well as some definitions related to corporate groups.

Title 2, under the heading *Associations*, contains provisions with regard to associations in general. This title according to article 53a of the NCC – save for article 26, paragraph 3 and article 44, paragraph 2 – applies to cooperatives as well, unless Title 3 on cooperatives and mutual insurance companies provides otherwise. However, Title 3 has been composed by the legislature into two sections: the first on general provisions for all cooperatives (not being SCEs) and mutual insurance companies and the second for cooperatives and mutual insurance companies that have to apply a statutory two-tier regime providing for a mandatory supervisory board with mandatory, though low-level co-determination rights for employees.

In Title 4 on private companies limited by shares, there are some specific provisions on the conversion of cooperatives into private companies limited by shares and vice versa (articles 71/181 and articles 72/183). Then, Title 7 contains general provisions on domestic legal mergers that apply also to legal mergers between cooperatives and between

cooperatives and other legal persons (not being SCEs). It's worth mentioning that the Second Book of the NCC does not contain any provision for cooperatives to engage in a cross-border legal merger, save for the provisions envisaged in the European Cooperative Society Regulation and the Netherlands implementation act thereof. Note, however, that cooperatives without having to establish an SCE may engage in a cross-border legal merger with cooperatives from other member states on the basis of the European Court of Justice decisions in the SEVIC-case (Van der Sangen, Dortmond & Galle 2007, p. 77 and Van Veen et. al. (eds.) 2006, p. 6). In Title 7, section 4 we find general provisions on legal splits (decision) that also apply to cooperatives. In Title 8, section 2, we find the inquiry procedure of the Enterprise Chamber of the Amsterdam Court of Appeal that applies to cooperatives as well, providing members of the cooperative, trade unions and the public prosecutor the opportunity to request an inquiry into the affairs of the cooperative and into the way the board has conducted its affairs. Finally, Title 9 contains general provisions applicable to cooperatives with regard to annual accounts and consolidated annual accounts and the obligation to disclose them.

In summary, the part most relevant to cooperatives in the Second Book of the NCC can be found in articles 53 up to 63j and, by way of analogy, in articles 26-52 on associations in general (save for articles 26, paragraph 3 and 44, paragraph 2). Enclosed are the Netherlands text of the NCC relevant to cooperatives as well as the translation in English (Kluwer, Legal Persons, loose leaf edition, Deventer).

Evaluating the current legislation for cooperatives, in general the Netherlands law on cooperatives and associations has been regarded by practitioners as very flexible with regard to setting up a cooperative and tailoring the cooperative's articles of association to the needs of the incorporators. In this respect, it is essential to point out that according to Netherlands law, cooperatives are under no obligation to adhere to additional social or civil society principles, nor are they under any obligation to associate potential new members unless the articles of association stipulate otherwise.

However, cooperatives in general are treated for the purpose of taxation at the same footing as private companies limited by shares. The facilities for corporate tax reduction for payments to patrons/members are regarded as being too stringent (see section 3.10.). The same is true in respect to the application of anti-trust law. Cooperatives generally are not granted a preferential treatment vis-à-vis investor-owned firms in this respect.

As indicated above, the use of the cooperative as a business form is widespread in several areas of the agricultural industry, commonly as the parent company. It is allowed in the Netherlands that a cooperative functions as a holding company while the actual business groups and units are organized as private companies under full control of a sub holding. On rare occasions, the cooperative is used for consumer retail activities (C1000) and as a business form for employee-owned firms. The cooperative has been widely used to organize full service banking activities side to side with investor-owned firms, for the example through the Rabobank Group organization, a cooperative of local cooperative

banks. It is worth mentioning that the cooperative recently has been used on a regular basis as a tool for tax planning by law and accounting firms as well as private equity firms, on account of the fact that cooperatives are not submitted to taxation on the distribution of profits. So, in these cases the cooperative is merely used as a special purpose vehicle within the legal boundaries of Netherlands law on cooperatives and associations (Van der Bijl 2010).

3.2. Definition and aim of cooperatives

Pursuant to article 53, paragraph 1, Second Book, NCC a cooperative is an association established as a cooperative by a notarial deed. Under its articles of association, its statutory objective must be to provide for certain material needs of its members under agreements, other than insurance agreements, concluded with them in the business it conducts or causes to be conducted to that end for the benefit of its members. In this respect, it is important to point out that according to Netherlands law, save for the restriction on insurance activities, a cooperative can take up all kinds of business activities that the members wish the cooperative to perform, as long as it entails economic transactions with the members that ultimately benefit its members. It is irrelevant how the cooperative benefits the economic interests of its members, either through restitutions or additional payments on transactions or through the distribution of annual profits. The cooperative is allowed to function as a holding company, provided that the economic interaction with its members will be executed by one of its designated subsidiaries.

According to article 53, paragraph 3 and 4, Second Book, NCC, a cooperative may expand its business to non-members on the same footing as members provided that the articles of association explicitly facilitate this option and the total amount of economic interaction with members does not become of subordinate importance. The cooperative is allowed to pursue other non-economic interests as well, in so far as the articles of associations do not preclude it and the pursuit of non-economic interests is linked with the statutory economic objective of the cooperative.

3.3. Activity

According to the abovementioned legal definition, a cooperative has to benefit the economic interests of its members by engaging in transactions with them other than insurance contracts. For this objective, the mutual company or the public company is the mandatory legal business form. There are no restrictions in the law on cooperatives with regard to the scope of activities. Of course, cooperatives, like any other company, may be subject to specific regulations, like regulations on the supervision of financial institutions.

As described above, a cooperative may expand its business to non-members on the same footing as members, provided that the articles of association explicitly facilitate this option and the total amount of economic interaction with members does not become of subordinate importance. The cooperative is allowed to pursue other non-economic interests as well in so far as the articles of associations do not preclude it and the pursuit of non-economic interests is linked with the statutory economic objective of the cooperative.

3.4. Forms and modes of setting up

Cooperatives are formed either ex novo through the establishment of a new legal person or through a legal merger between two or more already existing cooperatives or through the conversion of an already existing legal person into a cooperative. In practice, the first option is commonly used.

The establishment of a new cooperative requires a minimum of two incorporators, being the first members of the cooperative. Although some legal scholars (Van der Sangen, Dortmond & Galle 2007, p. 5) argue that a cooperative with one single membership does not fall within the scope of the legal definition of the cooperative, the Netherlands law allows a cooperative to exist as a legal person in case only one single member remains. In case no members remain, the cooperative will be dissolved (see article 19, paragraph 1, Second Book, NCC). According to Netherlands law on cooperatives, the creation of a single membership cooperative therefore is not prohibited. Furthermore, the cooperative is under no obligation to associate other potential members unless the articles of associations indicate so. It is for this reason and for tax purposes that the single member cooperative is used as an alternative to private companies in order to obtain the benefits of limited liability and entity shielding by small firms and service providers and as a special purpose vehicle in (international) financial and investments arrangements induced by private equity funds.

A new cooperative may also be established through a legal merger. However, according to the current regulations on domestic legal mergers in the Netherlands, only pre-existing cooperatives have the opportunity to merge into a new cooperative. Other legal persons wishing to merge with a cooperative need to be converted into a cooperative prior to the legal merger (articles 310, Second Book, NCC).

3.5. Membership

As indicated under 3.4, the Netherlands cooperative requires from its inception a minimum of two members. However, in case one member withdraws from his membership

leaving the cooperative with one single membership, the mere fact that the cooperative has only one member left does not lead to the dissolution of the cooperative.

Apart from specific requirements for membership in the articles of association, the law itself does not contain any membership requirements. Natural persons as well as legal persons are allowed to become members. Once a member, the member is not obliged to enter into transactions with the cooperative, save for an obligation to do so in the articles of association establishing an exclusive economic relationship. The articles of association may impose on members other obligations or requirements, like the obligation to participate in an equity funding arrangement or to pay an entrance fee (see articles 27, paragraph 4 and 34a, Second Book, NCC).

According to the general opinion in the literature as well as following from the provisions in the law on associations – which apply to cooperatives unless indicated otherwise – non-using members are allowed to be provided in the articles of association. Since the economic interaction with using members is the quintessence of the statutory objective of the cooperative, some scholars (Dortmond 1992 and Van der Sangen, Dortmond & Galle 2007) have pointed out that the introduction of non-using members, like investor members, should be regarded as an exceptional option, however, without providing clear-cut thresholds. The legislature has solved this issue by providing that non-using members, although admissible, can only be granted a limited number of voting rights, if any, according to articles of association. The total amount of voting rights of the non-using members in the general meeting has been mandatorily restricted to one half of the total number of votes actually cast in the general meeting (see article 38, paragraph 2, Second Book, NCC).

As a general rule, the board decides on the admission of new members. In the event of refusal, the candidate may address the general meeting to scrutinize the board's decision. However, the articles of association may provide for another procedure (see article 33, Second Book, NCC). The law on cooperatives (and associations) contains no additional provisions on the admission of new members, leaving incorporators ample flexibility to provide for membership requirements.

3.6. Financial profiles

According to the system of cooperative regulation, it is assumed by the legislature that the cooperative will be funded by equity provided for by its members. Contrary to private companies limited by shares, members are under no obligation to participate in financial arrangements for raising equity unless the articles of association provide otherwise. Hence, there are no minimum capital requirements for the establishment of a cooperative. However, in case of insolvency or liquidation of the cooperative, the members are severely and jointly liable towards to receiver of the insolvent or liquidated cooperative to pay for the

total deficit. This regime for statutory liability in case of liquidation may be set aside in the articles of association and be replaced by either a restricted liability to pay for the deficit or a complete exclusion of any kind of liability of the members. The restriction or exclusion of membership liability has to appear in the name of the cooperative in order to rely upon it vis-à-vis third parties. On the basis of the total number of cooperatives assessed on 7 April 2010, 4303 cooperatives used a complete exclusion of liability, 309 used a limited liability and only 158 cooperatives used a statutory liability.

However, this legal system laid down in article 55 and 56, Second Book, NCC does not preclude cooperatives from the introduction of share capital to members. Nevertheless, since the purpose of the cooperative is to foster the economic interests of its members through engaging with them into specific economic transactions, the issuance of shares is commonly related to the (amount of) economic transactions between the cooperative and its members.

Although it is not prohibited in generic terms for cooperatives to issue financial instruments, the issuance of shares providing a return on capital invested by either members or third parties is assumed to be exceptional, according to general opinion in legal scholarship (Dortmond 1991, Galle 1993, Van der Sangen, 1999 en 2007 and Van der Bijl 2010).

Notably, with regard to agricultural cooperatives, members are obliged in the articles of association not only to participate in equity funding – either through the retention of the net proceeds or through an obligation to participate in the issuance of shares related to the amount of the economic transaction with the cooperative, but also to participate in financing the cooperative through long-term loans. These long-term loans generally involve a repayment after a fixed period (e.g. 10 years) or after withdrawal. In case of insolvency or voluntary liquidation of the cooperative, members are not entitled to compensate their right to payment of the loan with their obligations to pay to the cooperative, therefore generating an additional guarantee for non-member creditors that their obligations will be met in case of insolvency or voluntary liquidation (see article 55, paragraph 5, Second Book, NCC and the High Court decision in the case Sol vs. Cebeco).

With regard to the distribution of profits/net proceeds, the regulation on cooperatives is rather flexible. On the basis of the law, members are not entitled to an annual payment of their share in the net proceeds or profits, unless the articles of association provide otherwise. Article 27, paragraph 4, Second Book, NCC merely stipulates that the articles of association have to contain a provision on the allocation of profits *in case of liquidation*. The incorporators are free to provide for any form of profit allocation in the articles of association, including no provision or a provision that adds the profits to the general reserves of the cooperative.

A cooperative, like any other entrepreneurial firm, is under an obligation to compose an annual account and profit and loss account according to the standards set out in Title 9, Second Book, NCC (article 360 and further) and under an obligation to disclose these

accounts through submission at the commercial registrar (article 394) within 2 months after approval of the accounts by the general meeting. Approval of the accounts by the general meeting is due within 6 months after closing of the financial book year, with a possibility of an extension of 5 months (article 58). The maximum timeframe for disclosing the annual accounts is 13 months after closing of the financial book year (article 394, paragraph 3). However, small and medium-sized companies are completely or partially exempted from these disclosure requirements (art. 396 and 397). Since cooperatives in practice function as a parent company or holding company, cooperatives may have to produce and disclose consolidated accounts on the basis of the 4th and 7th EC Company Law Directive, implemented in articles 405 and further of the Second Book, NCC.

Compulsory reserves of the cooperative are either statutory reserves mandated by law, like enunciated in detail in article 373, paragraph 4, Second Book, NCC or reserves provided for in the articles of association. In both cases, a cooperative is not allowed to distribute these reserves nor use them for the redemption of losses incurred by the cooperative (article 58, paragraph 4).

3.7. Organisational profiles

The Netherlands regulation on the internal structure and its corporate governance system is very flexible and contains only two statutory organs to be created in the articles of association: the general meeting of shareholders and the management organ (the board). Save for the statutory two-tier board regime for large cooperatives as laid down in articles 63a and further, Second Book, NCC, a supervisory organ is not imperative. In case a cooperative chooses not to have a separate supervisory organ, the cooperative will be obliged to have its annual financial accounts monitored either by a commission of two members not being members of the management organ or by a certified auditor (see article 58, paragraph 1, read in conjunction with article 48, paragraph 2, Second Book, NCC).

However, like mentioned above, large cooperatives within the meaning of article 63, paragraph 2 – having an equity of € 16 million, a total amount of 100 employees and a works council installed on the basis of its mandatory obligation from the Act on Works Councils – have to create after 3 years in their articles of association a mandatory supervisory organ with special powers, notably the power to veto board decisions on major transactions as described in article 63j, Second Book, NCC and the obligation to sign for the annual final accounts. Note that even in the case the statutory two-tier regime applies, board members are appointed and dismissed by the general meeting. Members of the supervisory organ in the statutory two-tier regime are appointed by the general meeting on the basis of a proposal by the supervisory organ. While making this proposal, the supervisory body needs to take into account recommendations by the general meeting and

the works council. Please note that the statutory two-tier regime does not apply to the Netherlands SCE *ipso iure*, but may be applicable on an SCE on account of the outcome of the negotiation procedure with the special negotiation body or the application of the before and after-principle in the Directive (Van Veen (eds.) et. al. 2006, p. 196).

Members of the management organ are appointed by the general meeting. However, the articles of association may allow for a different mode, provided that members remain in the position to take part in the election of board members through an intermediate procedure. For example, it's allowed in case a cooperative has a very large number of members that the members choose delegates and that these delegates act as the general meeting (see article 39, Second Book, NCC) that elects directly or through an intermediate procedure the members of the management organ. It is even allowed that the elected delegates, acting as the general meeting, elect the members of the supervisory organ that subsequently elects the members of the management board (see Van der Sangen 1999 and Schreurs-Engelaar 1995).

With regard to the composition of the management organ of the cooperative, the Netherlands law is very flexible. Although members of this organ are appointed by members and candidates have to be members, the articles of associations may allow that board members are not members, but e.g. professional managers (see article 37, paragraph 1, Second Book, NCC). There are no restrictions in this respect. Secondly, it is allowed that less than half of the total number of board members will be appointed by non-members (see article 37, paragraph 3, Second Book, NCC). However, since the Netherlands law on cooperatives allows the cooperative to function as a holding company while the actual cooperative enterprise is run by a subsidiary, the appointment of professional management of the subsidiary poses no real obstacle from a legal point of view. If the cooperative is organized in this way, the management organ of the cooperative holding functions *de facto* as a supervisory body (see Van der Sangen, Dortmond & Galle 2007, p. 24).

Since there are no specific rules with regard to the appointment of an external auditor, save for provisions in the articles of association, the management organ selects the external auditor.

Article 38, Second Book, NCC contains an extensive regulation for voting rights in the general meeting. Although all members are entitled to vote on the basis of the "one member, one vote" principle by way of a default rule, the articles of association may allow a differentiation of voting rights, e.g. related to the value or number of economic transactions for each individual member with the cooperative over a certain period of time (see article 38, paragraph 1, last sentence). Secondly, the articles of association may introduce voting rights for non-members. The voting rights of non-members is, however, restricted to one half of the total amount of votes actually cast by the members in the general. This provision, laid down in article 38, paragraph 3, may be used to adjudicate

voting rights to non-member investors (Van der Sangen, 1999, Van der Sangen, Dortmond & Galle 2007, p. 168 as well as Dortmond 1992 and Galle 1993).

3.8. Registration and control

Under the rules for disclosure of corporate data, cooperatives are obliged to register the cooperative at the commercial register in conformity with the Act on Commercial Registers 2007 (Handelsregisterwet 2007). Specific requirements for disclosure as well as the company's items to be disclosed are laid down in the Royal Decree on Commercial Registers 2007 (Handelsregisterbesluit). There is no specific register for cooperatives. Cooperatives – save for cooperatives involved in banking, financial and insurance activities – are not subject to public control or any form of external control.

3.9. Transformation and conversion

Cooperatives are allowed to transform themselves into a different legal business form under the general provision for all legal persons provided in article 18, Second Book, NCC. There are no restrictions for cooperatives with respect to the scope of the legal business forms to be transformed in, provided the legal person after transformation is either an association, mutual company, private company limited by shares or a foundation. A transformation entails no alteration or change of the legal personality (article 18, paragraph 8) and therefore does not entail any transfer of assets or liabilities.

Transformation of a cooperative requires a resolution of the general meeting with a majority of 9/10 of the total amount of votes cast at the meeting, a separate resolution of the general meeting to amend the articles of association and a deed of transformation by a notary, containing the amended articles of association.

In case of a transformation into a private company limited by shares, additional requirements have to be met, including:

- a declaration of the Minister of Justice that there are no objections to the transformation or the amendments of the articles of association;
- an affidavit of a certified auditor that the value of assets of the company five months before the transformation equals the total amount of shares paid for according to the notarial deed of transformation;
- the written permission of every single member whose shares will not be paid for at the time of the transformation out of the cooperative's pre-existing reserves (article 72/183, paragraph 2).

It is assumed that all members will become shareholders. However, transformation triggers the statutory right of members to withdraw from the cooperative, to be executed

within one month after the resolution of the general meeting (article 72/183, paragraph 3, read in conjunction with article 36, paragraph 4, Second Book, NCC).

A cooperative may be *de facto* transformed into a private company limited by shares through a legal merger on the basis of article 310, paragraph 4, if the private company is the only member of the cooperative and the cooperative acts as the disappearing company in the merger. A cooperative may be transformed into an SCE on the basis of article 35 SCE Re and article 10 Implementation Act. A cooperative may not be transformed into an SE. A cooperative may be transformed into a EEIG on the basis of article 8 of the Act Implementing the European Economic Interest Grouping Regulation.

3.10. Specific tax treatment

In principal, cooperatives are treated for the purpose of taxation at the same footing as private companies limited by shares and are subject to the Corporate Tax Act 1969 (article 2). This implies that cooperatives have access to the same tax facilities as corporations, but cooperatives and their members also suffer the same burden of taxation as corporations and its shareholders. However, in order to take into account the hybrid character of the cooperative as an incomplete vertical integration between the economic units of its members and the cooperative, the Netherlands legislature introduced a specific tax deduction regime for cooperatives in article 9, Corporate Tax Act 1969. However, the facilities for corporate tax deduction for payments to patrons/members are regarded as being too stringent by incorporators, hampering innovations in financing cooperatives with additional equity capital funded by members or external investors distinct from the economic interactions between members and the cooperative. The Netherlands legislature ruled that the profits of a cooperative are deemed to be split in an independent profit – connected with non-cooperative activities – and a partially deductibility regime profit (PDR profit). However, cooperatives are only allowed to deduct the PDR profit if four criteria simultaneously are met:

- the PDR profit must have been distributed immediately within one year after the book year in which the profits were gained;
- the PDR profits to be distributed are restricted to the amount of profits gained in one book year, meaning that prior reserves of profits are not considered to be tax deductible, if distributed in the following years;
- the PDR profits must be distributed to the members in proportion of the value of their economic transactions with the cooperative, and
- the PDR profits are only deductible if distributed to members that are natural persons; a number of five legal persons being members, however, will not be taken into account.

Another pivotal issue with regard to the tax burden of cooperatives is considered the issue of fixing or estimating the profits of a cooperative if the cooperative does not pay for the economic transactions with its members on the basis of market prices. Profits for taxation purposes have to be fixed on the basis of market prices, which may render a problem if the cooperative is the only or one of the few entrepreneurs in the market.

Apart from the Corporate Tax Act, in the literature (Jansen 1996, Van der Geld and Van Weeghel in: Van der Sangen, Dortmond & Galle 2007, p. 85 and further and p. 99 and further respectively) questions were raised with regard to the question of whether a cooperative paying dividends on capital invested would be subject to an obligation to pay dividend taxation according to the Dividend Taxation Act. This act, however, technically, only applies to companies with share capital. Cooperatives – at least that is the expressed and published opinion of the Minister of Finance – are not considered to be companies with share capital, meaning that cooperatives can distribute profits to investors without paying any taxes on dividends. This granted fiscal leeway accounts for the recent increase of the establishment of holding and sub holding cooperatives, notable in private equity financial arrangements (see on this issue Van der Bijl 2010).

3.11. Existing draft proposing new legislation

At this moment, the Netherlands legislature is not contemplating any reform or revision of the regulations with regard to cooperatives. The cooperative movement, practitioners and legal scholars are of the general opinion that Netherlands cooperative law is very flexible, leaving ample opportunity for incorporators to seek tailor-made adjustments to the cooperative legal statute.

The Netherlands legislature is currently in the process of reforming its regulation on private companies limited by shares, adding – amongst others – the possibility to insert in the articles of association of private companies additional obligations for shareholders next to their obligation to pay considerations on share capital. It is understood that this facility will create the opportunity for incorporators to establish a company on “cooperative” principles by choosing the future business form of a private company limited by shares. Please note that the Netherlands law does not mandate incorporators who want to establish a company based on cooperative principles to use the legal form of the cooperative.

3.12. Essential bibliography (in alphabetical order)

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4. The SCE Regulation and national law on cooperatives

Although the Netherlands has an active and well-organized cooperative movement, the introduction of the European Cooperative Society did not lead to an intense debate on the merits of this new pan-European business form aiming at cross-border cooperation between cooperatives from different member states amongst practitioners and potential users from the cooperative movement. The same is true for the academic debate with regard to the introduction of the SCE vis-à-vis other business forms, notably the cooperative and private companies limited by shares, including the SE. Most academic publications confined themselves to comment on the regulation of the SCE as set out in the Regulation and the Directive on the involvement of employees. One publication (Dortmond 2006), however, actually encapsulated in the analyses the implementation act. Since only one SCE has been established in the Netherlands, until now there are no accounts in the literature on the experience with the SCE in practice. Contrary to the situation in Germany, in the Netherlands the introduction of the SCE did not have any harmonizing effect with regard to the regulation of the cooperative.

- Comparing the SCE implemented in the Netherlands law with the cooperative, the SCE Statute contains several beneficial features that, theoretically, incorporators may take into account while contemplating to opt for the SCE or the cooperative. However, in order to create an SCE, a cross-border element is required and therefore it cannot be used by incorporators seeking a legal business form for their cooperative enterprise that intends to expand the cooperative enterprise cross-border in the future. The beneficial features are:
- contrary to the Netherlands law on cooperatives, the SCE can be established for a fixed period;
- contrary to the Netherlands law on cooperatives, the SCE is able to transfer its seat to another member state;
- contrary to the Netherlands law on cooperatives and legal mergers, the SCE Statute provides for cross-border legal mergers between cooperatives and/or SCEs from different member states;
- contrary to the statutory two-tier regime for “large” cooperatives, the SCE Statute does not force the incorporators to apply this regime and provides the possibility to opt for a one-tier board.

However, these benefits do not outcompete the cooperative even in a cross-border setting because the benefits seem trivial compared to the flexibility of the cooperative and, secondly, the SCE Statute itself contains restrictive features the cooperative does not encounter.

With regard to the triviality of the benefits, it's questionable whether in practice there is a need to transfer the seat of a Netherlands cooperative to another member state. More importantly, the SCE Statute mandates that the real seat and seat of incorporation coincide, meaning that the cooperative that wishes to form an SCE in order to transfer its seat has to transfer its real seat – the central place of administration or headquarters – as well.

Although the Netherlands law until now contains no specific provision on cross-border legal mergers for cooperative, cooperatives may enter into a cross-border legal merger on the basis of the European Court of Justice decision in the Sevic case, applying national legal merger law in case the Netherlands cooperative is the acquiring company.

Although the statutory two-tier regime is not applicable to the SCE, for existing cooperatives from the Netherlands with a statutory two-tier regime, this may necessitate the creation of a two-tier board model with components of the statutory two-tier regime on account of the outcome of the procedure for the involvement of employees.

Besides the triviality of the benefits of the SCE Statute, the SCE Statute itself compared to the cooperative contains a large number of restrictive features:

- Although membership can be fixed for an extensive period of time as well as the period for withdrawal, members of a SCE can withdraw from their membership immediately in the cases set out in article 15, paragraph 2, SCE-Re. According to articles 36, paragraph 3, Second Book, NCC this right of withdrawal can be excluded in the articles of association, a provision commonly used by cooperatives.
- The mandatory connection between the real seat and the seat of incorporation. Since the Netherlands adheres to the incorporation theory (article 2, Act on Conflict Law Corporations), there is no legal restriction in this respect for cooperatives, nor for accepting members from other member states.
- The hybrid character of the SCE between association and company with share capital, which is not commonly used in the Netherlands by cooperatives.
- The minimum capital requirement.
- The adjudication of voting rights to members, non-using members and non-members is more complex and more restrictive.
- The establishment of an SCE by already existing cooperatives with co-determination forces the cooperatives to enter into negotiations with representatives of employees or to apply the Standard Rules of the Directive.
- From a tax law point of view, the SCE is treated like a company with share capital and therefore has no access to tax facilities designed for cooperatives.

In short, the benefits of the SCE Statute are not self-evident, while the regulation of the Netherlands is very flexible. Compared to other legal business forms, the cooperative does not encounter any legal obstacle that may hamper its future development. However, as pointed out above in section 3.10, the tax facilities for cooperatives to deduct the PDR profit is considered to be too restrictive and hampers innovations in the field of equity raising by cooperatives.

NORWAY

By Ole Gjems-Onstad

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Norwegian legislation. – **1.1.** Source, time and modes of implementation. – **1.2**. Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg**.. –1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Norwegian legislation. – **2.1.** Not a controversial legislation. – **2.2.** No Norwegian SCE established. – **2.3.** Preparations by the national legislation and public authorities.**–3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Dissolution, merger and de-merger, transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Norwegian legislation

1.1 Source, time and modes of implementation

Norway is not a member of the EU, but a member of the EEA (European Economic Area). The SCE Regulation 1435/2003 falls within the scope of the EEA Treaty Art 77. The Regulation was made binding for Norway by the decision of the EEA Committee on 6th February 2004 (No 15/2004) to make it part of the EEA Agreement. The Regulation as such should be made part of domestic Norwegian Law, see EEA Treaty Art 7 para. a.

Norway implemented the Regulation on European Cooperatives by enacting Law 30th June 2006 No 50 on European Cooperatives.

The main preparatory work was Odelstingsproposisjon nr 60 2005-2006 (Proposition to the Odelsting [Part of the Norwegian Parliament] No 60 2005-2006).

The directive on workers' participation was the basis for the adoption by the Norwegian Ministry of Labor of Forskrift (Regulation) 3rd November 2006 No 1213 om arbeidstakernes innflytelse i europeiske samvirkeforetak (On the Participation of Employees in European Cooperatives).

1.2 Structure and main contents of the regulation

The Norwegian SCE Act 50/2006 is brief, covers two pages and contains 14 paragraphs. The reason for this is that the SCE Regulation 1435/2003 is incorporated into Norwegian law as part of the regulation. Consequently, one has to cross-read and cross-

check the brief Act 50/2006 and the SCE Regulation 1435/2003 to establish what the law is. In addition, the Norwegian SCE Act 50/2006 makes references to Norwegian Cooperative Act 29th June 2007 No 81, which represents an additional challenge for readers who want to make use of the SCE Act 50/2006. These complications were commented upon when the Norwegian SCE Act was proposed. One of the reasons why these objections were not taken into account by the Ministry of Justice may be that one did not regard the Norwegian SCE Act 50/2006 as an instrument for amateurs.

Compared to most Norwegian legislation, the law on European Cooperatives is quite complicated due to its integration of European level and Norwegian level legislation. The language and structure of the SCE Regulation No 1435/2003 will appear alien to most Norwegian users.

1.3 The designated Authority/ies as required by art 78, par. 2, SCE Reg.

The Norwegian Enterprise Registry has been designated as the Authority provided for by Art 78, par. 2 of the SCE Reg.

The Norwegian Foundation Authority that supervises Norwegian cooperatives has also been provided with some authority to deal with European Cooperatives. In the case of mergers and divisions the Law on European Cooperatives refers to Norwegian Cooperative Act. Sometimes under the Norwegian Cooperative Act an authorization from the Foundation Authority may be necessary to enact a merger etc. This will also be the case for European Cooperatives.

1.4 Essential bibliography

There are no published articles or books on the Norwegian SCE Act 50/2006. The most extensive written source will be preparatory work Odelstingsproposisjon nr 60 2005-2006 (Proposition to the Odelsting).

The SCE Act 50/2006 is only briefly mentioned in the only Norwegian monograph on the Norwegian Cooperative law according to the Norwegian Cooperative Act 29th June 2007 No 81 (Tore Fjørtoft and Ole Gjems-Onstad: *Samvirkeforetak*. Gyldendal Akademisk. 2009).

In the database and publication Norsk Lovkommentar (Commentaries on Norwegian Acts), professor Tore Bråthen has written 44 notes to the SCE Act 50/2006. Most of the comments are very brief consisting of only one line.

2. A comment on the implementation of the SCE Regulation in Norwegian legislation

The following comments are partly based on interviews with representatives of: the Norwegian Ministry of Justice, the Norwegian Enterprise Registry, the Norwegian Foundation Authority, the Norwegian Cooperative Centre.

As there are no registered SCEs in Norway, it has not been possible to interview any representatives of any registered Norwegian SCE.

2.1 Not a controversial legislation

Before the proposal for the SCE Act was put forward to the Norwegian Parliament, a proposal was made available for a public hearing by the Ministry of Justice (Working Paper of 22nd September 2005). Of the many recipients of the working paper, 37 organisations or institutions responded. Among these respondents, 18 organisations submitted substantive comments.

As an overall point of view, the comments were positive. The respondents welcomed the proposed legislation for mainly two reasons:

- It would be easier for Norwegian cooperatives to enter into cross border cooperation. Also housing cooperatives that one normally might think would have their main focus on domestic building projects, ventured that new trends regarding second homes and retirement homes, might make for new ways of thinking and new international projects.
- At this time a new Norwegian law on domestic cooperatives had been proposed (a draft law was submitted by a Norwegian Governmental Commission in NOU 2002: 6). Norway had never before enacted any law on cooperatives. A number of institutions commented that it would be an appropriate combination also to enact a new law facilitating cross border cooperatives.

2.2 No Norwegian SCEs established

In spite of the proposed Norwegian SCE Act not being controversial and mostly eliciting positive commentaries, the SCE Act has not received much attention in Norway. Its predecessor or sibling, the Law on European Companies, Law 1st April 2005 No 14, has drawn more attention, among other reasons, due to its potential as a tax planning vehicle in moving companies and assets out of Norway without exit taxation.

Up to the present date, no European Cooperative has been established or registered in Norway. The Norwegian Enterprise Registry has, according to its own statement during a

telephone interview (the Enterprise Registry is located in Brønnøysund – a very long and complicated journey from Oslo), not received any requests regarding registering any European Cooperative. Neither has the Norwegian Foundation Authority that supervises Norwegian cooperatives and also has the authority to deal with European Cooperatives, noted any requests displaying any interest in forming a European Cooperative – as stated in a telephone interview (The Foundation Authority is located in Molde – also at a significant distance from Oslo).

In Norway, around 10 European Companies have been registered. At least five of these may have moved to another country. Consequently, the hypothesis that European Companies may be used for tax purposes may have some founding in practice.

The question is, of course, why no European Cooperatives have been established in Norway. One answer given by professional advisors working with cooperatives is that Norwegian cooperatives most often are not working on an international level. Many traditional cooperatives are engaged in agriculture, forestry and fishing. New cooperatives are often dealing with matters like childcare, local broadcasting etc that, due to its activities, are locally oriented.

In Norway, consumer cooperatives have for a long time been cooperating on a Nordic basis. Some years ago, this cooperation was formalized through a joint ownership of a limited company. This limited company has, however, now been dissolved. The reason for this dissolution does not appear to relate to causes that may be solved through the European Cooperative.

Another reason why no European Cooperative has been formed may be related to the fact that Norway is not a member of the EU. Most Norwegian cooperatives will probably feel that the SCE legislation is very complicated, and different in style from the legal language of Norway. The same objections may be raised regarding the law on the European Company. But more ordinary limited companies may be internationally oriented than what is the case for most cooperatives. Also, compared to the number of limited companies (AS – aksjeselskaper) registered, about 230,000, the number of European Companies (approx 10) is quite insignificant. The potential of European Companies as a tax saving instrument may also, from a cost-benefit viewpoint, have made the potential parties more motivated to inquire into the use of the form of the European Company.

It may also be added that Norway, as already hinted at, until the enactment of the Law on Cooperatives 29th June 2007, did not have any legislation on cooperatives. During the last century, four governmental attempts to draft or enact statutes on cooperatives had failed. The success of the fifth attempt on establishing a regulatory framework for cooperatives was probably due to the fact that the cooperatives themselves realized that the lack of a formal regulatory framework limited the activities into which they were allowed to engage themselves. This limitation was e.g. quite evident in the sector of banking and financial services. When the Law of 2007 on Cooperatives was finally enacted, it offered existing cooperatives a very generous transition period of five years. The Law on

Cooperatives entered into force on January 1st 2008. But existing cooperatives will not have to submit to the law until Jan 1st, 2013. One of the reasons why no European Cooperative have been registered may also be due to the fact that many existing cooperatives feel that coping with one new act is sufficient for the time being. I know of no Norwegian cooperative being a member of an SCE registered abroad.

Some big cooperatives have some knowledge of the SCE Act. Most are not likely to know the SCE Act.

2.3 Preparations by the national legislator and public authorities

Probably, nobody expected a rush of Norwegian cooperatives wanting to make use of the SCE form. Nevertheless, the authorities have made preparations. The SCE Act No 50/2006 and the Worker Participation Regulation were adopted in fairly reasonable time. The appropriate supervisory authorities, the Enterprise Registry and the Foundation Authority, according to the conducted interviews, made sufficient preparations and competence building to be able to meet any questions or requests for assistance. But there quite simply have been no inquiries (at least as far as the current reports have been able to establish through interviews), and definitely no registrations.

3. Overview of national cooperative law

3.1 Sources and legislation features

Norway has one single law, the Cooperative Act 2007, governing all kinds of cooperatives, except building and housing cooperatives and mutual insurance associations. Even though there may be substantial differences concerning the character and size of the enterprises, legislators became convinced that it is possible to form an act that provides for a satisfactory regulation for all cooperatives regardless of size.

In Norway, there are four big cooperative sectors: agriculture, fishing, consumer and housing. Housing is a very important cooperative sector in Norway. After World War II cooperatives became a notable instrument in the Norwegian housing sector by providing a lot of people with their own residence. On June 6th 2003, the Parliament adopted two acts on building and housing cooperatives (Acts No 38 and 39/2003) that replaced the former acts from 1960. Mutual insurance companies are regulated by Act 10th June 2005 No 40. Apart from these special acts, Norwegian cooperatives are regulated by the Cooperative Act 29th June 2007 No 81. For existing cooperatives, the 2007 Cooperative Act has to be implemented at the latest by January 1st 2013. Until then, the former unwritten law on cooperatives may be applied. The Cooperative Act 2007 is according to Art 1 fourth

paragraph No 3, 4 and 5) not applicable to housing cooperatives and mutual insurance companies. Nevertheless, if the applicable special legislation does not provide an answer, one cannot exclude that the principles of the general Cooperative Act 2007 may be applied.

3.2 Definition and aim of cooperatives

The Cooperative Act 2007 art 1 second paragraph defines cooperatives in this way:
(2) By a cooperative is meant a group whose main objective is to promote the economic interests of its members by the members taking part in the society as purchasers, suppliers or in some other similar way, when:
1. the return, apart from a normal return on invested capital, is either left in the society or divided among the members on the basis of their share of the trade with the group,
and
2. none of the members is personally liable for the group's debts, either in whole or for parts which together comprise the total debts.

According to this basic definition, there has to be some kind of economic transaction between the members and the cooperative. However, the law does not state explicitly what percentage of the transactions of the enterprise should be with its members to qualify as a cooperative. The transactions with the members may not be insignificant. But one may probably not require, as a general and mechanical rule, that at least 50 per cent of the transactions of the enterprise be with the members.

In regard to cooperatives that are part of a vertical structure (groups and federations) Art 1 third paragraph contains an exemption: In vertical structures it is not an absolute prerequisite that the members enter into transactions with the cooperative of which they are members. Instead they may, on further conditions, enter into transactions with another enterprise that is part of the same vertical structure, e.g. a subsidiary of the cooperative.

3.3 Activity

The Norwegian Cooperative Act 2007 does not directly exclude economic activities in which the cooperative may not take part. But housing cooperatives and mutual insurance companies will have to be established under the already mentioned special legislation. Financing activities will be regulated by specific financial regulation and the organisational requirements that are part of this legislation. The limitations regarding dealing with non-members are subject to the general criteria that economic transactions between the cooperative and the members have to be the substantial part of the activities of the cooperative, see 3.2 above.

3.4 Forms and modes of setting up

The formation of a cooperative requires that at least two persons date and sign a formation agreement (Art 8). The founders may be either natural or legal persons, and they may be either private or public bodies.

After the signing of the formation agreement, the formation has to be notified to The Norwegian Enterprise Registry within three months (Art 12). If this deadline is not kept, the formation agreement will be ineffective, and the cooperative cannot be registered.

There is no minimum capital requirement that has to be paid in connection with the formation. Art 25 simply states as a general condition that the cooperative should have "an equity that is adequate based on the risk involved in and the scope of the enterprise's operations".

3.5 Membership

A Norwegian cooperative should have at least two members (Art 8 paragraph one).The cooperative principle on voluntary and open membership is expressed in Art 14. The principal rule is that a cooperative must be open for all persons whose interests may be taken care of by the cooperative. Membership can only be denied on justifiable basis – there must be a relevant ground.

The basic rule is that members can resign from a cooperative at any time (Art 22). However, the bylaws may contain a time limit for withdrawal, which cannot exceed three months in primary cooperatives and 12 months in secondary and higher level cooperatives. Other kinds of withdrawal restrictions can only be laid down in the bylaws if there are weighty and reasonable grounds to do so.

The economic settlement in connection with a resignation may to some extent be regulated by the bylaws. The declaratory rule is that a resigning member has the right to have his capital investment reimbursed at nominal value. A limited interest on the investment can be paid if allowed by the bylaws. A resigning member has basically no right to a share of the cooperative's assets.

Memberships in cooperatives are in general not transferable, but the bylaws may contain provisions providing that memberships may be transferred on approval from the board of directors, the manager or others (Art 20). The acquirer must accede to the former member's rights and obligations towards the cooperative. This also includes contractual positions connected with the membership. The former member may still be held responsible for his economic obligations, if something else is not laid down in the bylaws or a separate agreement with the cooperative.

A member may be excluded from a cooperative in the case of a fundamental breach of his obligations (Art 23). Furthermore, the bylaws may establish that a member may be

excluded if the member does not have any transactions with the cooperative for a period of at least one year. As a main rule the economic settlement is the same for an excluded member as for a voluntarily withdrawing member, but the bylaws may provide for other solutions.

The Cooperative Act 2007 Art 24 mandates two kinds of sanctions in situations where the cooperative has violated the rights of a member: right to immediate withdrawal irrespective of any restrictions in the bylaws, and right to release (Art 24). The right to immediate withdrawal presupposes a fundamental breach. The right to release is, in addition, conditional on being not unreasonable to the cooperative. The conditions for release are meant to be very strict, partly because the amount of releasing is calculated according to the member's share of the cooperative's assets.

3.6 Financial profiles

As already mentioned, there is no minimum capital requirement regarding Norwegian cooperatives.

The law does not require the constitution of a reserve fund. The girder of the capital protection system is a requirement of *adequatet capital* in light of the risks and size of the enterprise, i.e. *a legal standard referring to prudent and good business practice*. The Cooperative Act 2007, as opposed to the acts on private and public companies, does not establish a distinction between free and tied up equity. Regarding private and public companies ("aksjeselskaper" and "allmennaksjeselskaper"), the Norwegian law has detailed requirements concerning what part of the capital that may be distributed. The cooperative law deviates from this tradition in its simplifying emphasis on the requirement that there should be sufficient capital left after any distributions.

The capital formation in Norwegian cooperatives has four main sources: members' investments, undistributed surplus, savings schemes for the members and external loan capital. When the Cooperative Act 2007 was adopted, the commission report and the Ministry of Justice discussed different kinds of external financing, e.g. transferable investment certificates. However, the commission and the ministry concluded that the capital formation in Norwegian cooperatives should still be based on self-financing supplemented with the possibility for member investments/savings and external loans. Consequently, the Norwegian law does not allow for a kind of equity with limited voting powers from non-members. The Norwegian legislature felt that allowing for equity from non-members might violate the basic cooperative principle that only members should control voting powers.

Like any other business enterprise in Norway, a cooperative is obliged to provide public financial statements and balance sheets that have to be deposited with the Enterprise Registry.

3.7 Organisational profiles

The general assembly and the board of directors are the only obligatory organs of a cooperative. Basically a cooperative should also have a manager, unless otherwise stated in the bylaws (Art 65). If a cooperative does not have a manager, the board leader – or the board as such – carries out his functions.

The general assembly is the supreme decision making body of the cooperative (Art 35). Every member has the right to meet at the general assembly, either in person or through a legal representative. In conformity with the cooperative principles, the basic rule is that each member has one vote at the general assembly (Art 38). However, the bylaws may allow the members additional votes due to the volume of their transactions with the cooperative. In secondary cooperatives the bylaws may also specify that votes shall be distributed on the basis of the number of members or geographical location of the primary cooperative. According to Art 38 paragraph two no member may by himself have the majority of the votes.

Decisions in the general assembly may be taken by simple majority, unless otherwise required by the bylaws or legal provisions (Art 53). Decisions amending the bylaws require a two third majority. Some amendments to the bylaws may only be enacted by an even more qualified majority (e g Art 103 paragraph two).

3.8 Registration and control

Norwegian cooperatives are registered with the Enterprise Registry. As indicated, they have on an annual basis to submit their financial statements to the Enterprise Registry. For certain crucial decisions, the cooperative will need the approval of the general supervising body for cooperatives - that is, the Norwegian Foundation Authority.

Cooperatives that have a turnover below NOK 5,000,000 (approx. euro 600,000) is required to elect an auditor (Art 97).

3.9 Dissolution, merger and de-merger, transformation and conversion

According to the Cooperative Act 2007 Art 127, the dissolution of a cooperative may either be voluntary or, in more extraordinary situations, compulsory. Dissolution may be resolved by *the general assembly* with the same majority as for the amendment to bylaws. Dissolution by *the court* is a sanction in instances where the cooperative has violated specific obligations of major importance, e.g. neglecting to submit the annual accounts or the auditor's annual statement to The Norwegian Register of Company Accounts (Art 141).

The basic principle is that the members on voluntary dissolution of the cooperative have the right to repayment of invested capital and any funds in their individualized member accounts, as long as the obligations towards the creditors are made up (Art 135). Any additional funds should be distributed to cooperative purposes or to public benefit purposes. Consequently, the main rule is that the members do not have any right to the net capital in the event of liquidation. The net capital, including undistributed profits and any remaining balance on the pay-back fund, apart from the individualized member accounts, is treated as a kind of collective cooperative capital not any more belonging to the cooperative under dissolution or its members. However, the bylaws may specify that on dissolution all or parts of the net capital should be distributed to the members – or even to former members – on the basis of the volume of their transactions with the cooperative during the last five years (possibly a shorter period if this is stated in the bylaws, but not shorter than one year). The net capital cannot be distributed to the members in any other way, e.g. under any other criteria than the volume of their transactions.

The Cooperative Act 2007 has rules on merger and de-merger (draft law chapter 8 and 9), which to some extent are identical to the corresponding provisions in The Private Company Act ("aksjeloven"). The primary objective of the provisions is to make it possible to accomplish these transactions in accordance with a continuity principle, i.e. that the legal positions of the transferring cooperative(s) continue in the absorbing cooperative. The mergers and de-mergers are accepted as non-taxable events as long as the tax cost basis etc. are continued by the merged and de-merged cooperatives.

Decisions on merger and de-merger can be made with the same majority as for amendment to the bylaws (normally a two third majority). If a merger or de-merger would result in the members of one of the involved cooperatives gaining increased access to the net capital in the event of liquidation, the draft law requires a three quarter majority at two subsequent general assemblies of the cooperative in question. In addition, there must be reasonable grounds for the transaction, and the Foundation Authority must approve the decision (Art 103. These conditions are the same as when the bylaws are amended so that the members get an increased right to the net capital in event of liquidation. The underlying rationale is also the same. The members should not be allowed to gain access to the net capital of the cooperative by way of a merger or de-merger if this alternative is blocked in the case of a direct liquidation.

Under the Cooperative Act chapter 11 a cooperative may convert into a private or public company without ceasing to be a body corporate. The conversion is based on a continuity principle. The objective of the rules is to facilitate restructuring processes and bring them into adequate forms.

Both the procedural and substantive provisions on conversion have much in common with the rules on merger and de-merger. It is, however, not necessary to send a notice to the creditors or to involve them in other ways. This is due to the fact that the rules on conversion refer to the rules on founding of private and public companies. Besides, in

connection with a conversion, there is no cash outgoing to the (former) members of the cooperative. The members get their compensation by way of shares in the company on the basis of the volume of their transactions with the cooperative during a certain period previous to the conversion. Thus, the shares are not distributed to the members according to the size of their investment in the cooperative.

3.10 Specific tax treatment

Under the current tax law, there are few special provisions applying to cooperatives. They will be charged the general tax of 28 per cent on net profits. Distributions to members may be taxed by an additional tax of 28 per cent, making the potential total tax burden into 48.16 per cent [28 % + (0,72 x 28 %)]. The tax burden is the same as for other incorporated enterprises. However, many cooperatives may claim a deduction for the distribution of surplus due to economic transactions with members. A general deduction of 15 per cent of net income as an allocation to collective equity has been repealed as the legislature has been notified that the EFTA Surveillance Authority regards such a deduction as an illegal state aid under the EEA Agreement.

Norway is among the few remaining countries applying a net wealth tax. In cooperatives, the members are not taxed as owners (as for shareholders with a maximum net wealth tax rate of 1.1 per cent). Instead the cooperative has to pay a net wealth tax of 0.3 per cent.

3.11 Existing draft proposing new legislation

There are, at present, no new legislative working papers or drafts concerning cooperatives. The reason may be that the Cooperative Act 2007 is quite new – in force from 1st January 2008.

3.12 Essential bibliography

There is only one monograph on the legal framework for cooperatives: Tore Fjørtoft and Ole Gjems-Onstad: *Samvirkeforetak*. Gyldendal Akademisk. 2009. Cooperatives are dealt with in handbooks and textbooks on company law and association law, but rather briefly.

4. The SCE Regulation and national law on cooperatives

So far, it does not appear that the SCE Regulation has had any impact on the general cooperative law in Norway. The SCE Regulation did not appear to influence the work of the legislature regarding the Cooperative Act 2007.

As the Cooperative Act 2007 is quite new and for many existing cooperatives not yet implemented due to the five-year transitional period ending 1st January 2013, there does not appear to be much debate regarding the current legislation. The most controversial point regarding cooperatives does not relate to cooperative law itself, but to tax law. At present, as the government has repealed the 15 % deduction for reserves concerning collective equity, this debate also seems to be at a standstill.

Probably, the most controversial point regarding cooperative law is the prohibition against obtaining some kind of equity from non-members.

POLAND

By Jacek Urbański and Adam Piechowski

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Polish legislation. – **1.1.** Source, time and modes of implementation. – **1.2**. Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, para 2, SCE Reg.**.** –**1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Polish legislation. –**3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aims of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of the SCE Regulation 1435/2003 in Polish legislation

1.1. Source, time and mode of implementation

The SCE Regulation 1435/2003 (hereafter: Regulation) has been implemented into the legislative system of the Republic of Poland by the Law of 22 July 2006 on the European Cooperative Society (hereafter: Law). It came into force on 18 August 2006. The passage of this law intends to meet the duty following from the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

1.2. Structure and main contents of the regulation

General remarks

Besides the provisions that aim at providing an efficient functioning of SCE in Member States, the Regulation contains several rules entitling national legislators to fill in the "gaps" left by the *acquis communautaire* as well as to enact about the deviations from standard solutions provided by that legal act.

The Law adopted in Poland provides solutions in favour of facilitating the activities of SCE, but concurrently provides some solutions that protect the security of legal transactions.

The Law is a concise act as it contains exclusively the indispensable provisions that adjust national law to the Regulation. They do not stipulate any changes in the Regulation itself.

Particular remarks

Art. 7 of the Law takes advantage of the authorization given by art. 2 par. 2 of the Regulation, considering that this would contribute to the enlargement of the circles of the legal bodies which are able to establish SCEs with their head offices located in Poland. This would indeed enable investors also from outside the European Union and European Economic Area to profit by the legal form of SCE in order to conduct their business activities in Poland. This may also result in increasing the competitiveness of the Polish variant of SCE for foreign investors looking for the place for their investment activity.

The Law authorizes state's competent authorities to express their opposition, motivated exclusively by public interest, towards merging in order to establish a SCE (art. 21 of the Regulation). It is suggested indeed to take advantage of that authorization with the limitation of the option of expressing such opposition to the case when the merging cooperative is a cooperative bank, and the new established SCE would have its registered office abroad. The competent bodies of bank auditing are then in the right to express the opposition towards the merger. One can make a complaint against such opposition to the administrative court.

One of the modes to incorporate a SCE is the conversion of an existing cooperative, being subject exclusively to the national law, into a SCE. The provisions contained in art. 35 of the Regulation regarding the conversion procedures have indeed several "gaps"; in order to avoid them, according to art. 8 of the Regulation, one should call Polish legislation. In order to avoid any doubts that may appear in practice regarding which regulations of the Polish law might be here in force, art. 10 s. 1 of the Law suggests to determinate the catalogue thereof, by referring to the provisions of the Commercial Companies Code. The reference to the Cooperative law could not obviously come into play, as it contained no regulations with regard to that issue.

In order to facilitate the work of the register courts and to accelerate the proceedings aiming at the registration of SCEs with their registered office in Poland, a catalogue of documents to be submitted to the registration court was set down with regard to each mode of SCE formation. The submission of a SCE to the enrolment in the register should be made on an official form defined by the Minister of Justice.

A SCE may be governed according to the two-tier system, existing also in Polish Cooperative law, or according to the one-tier system. The provisions concerning the two-tier system in SCE (chapter 1 of section 2 of the Law) are based on detailed authorizations within the Regulation and aim at adjusting the normative shape of that system to the solutions of Polish law. As far as the one-tier system is concerned (chapter 2 of the section

2 of the Law), which is not known in Polish Cooperative law, the Law stipulates to take advantage of the general authorization mentioned in art. 42 par. 4 of the Regulation.

Art. 15 of the Law, based on the authorization mentioned in art. 37 par. 2 of the Regulation and regarding the competences of the general assembly as far as appointment and dismissal of the management organ is concerned, aims at adjusting the European Regulation to Polish law (see art. 49 par. 2 and 4 of the Cooperative law). Moreover, section 2 of that article enlarges the freedom of self-regulation via statutes of a SCE with the registered office in Poland.

In art. 16, the right of a member of the supervisory council to exercise temporarily a function in the board of directors is limited. On the basis of art. 40 par. 3 s. 2 of the Regulation, the Law stipulates the right of any member of the supervisory council to request from the board of directors the presentation at the meeting of the council of specified reports, books and documents. This is an exception from the collegiality principle.

The general authorization stipulated by art. 42 par. 4 of the Regulation to regulate the one-tier system of the organizational structure in regard to SCEs with the registered office in Poland was also considered in Polish Law. It should be stressed that Polish regulations have a supplementary character towards the provisions of the Regulation (art. 42-51) being in force directly in all Member States including also Poland.

In the one-tier system (art. 20 of the Law) the possible competence disputes are minimized thanks to the granting of the governing role to the administration organ. In case of any doubts whether the provisions on the board of directors or supervisory council apply to the administration organ or its members, it is obvious that the provisions on the board of directors and its members apply here (art. 21 of the Law). Simultaneously, the Law enumerates the provisions of the Cooperative law that do not apply to the administration organ and its members as being inconsistent with the nature of the one-tier system or on the ground of the fact that the Regulation stipulates different solutions of these issues.

In order to avoid any abuses, the law provides specific requirements in respect to legal acts between SCE and the members of the administration organ or legal acts executed by SCE in the interest of a member of this organ (art. 25).The execution of such acts requires the resolution of the general assembly, and SCE is represented for executing these acts by a proxy appointed by the general assembly. These provisions also concern the acts, mentioned in art. 52 par. 1 of the Cooperative law, that constitute the basis for the employment of the members of the administration organ in the SCE.

In order to fulfil art. 7 par. 7 of the Regulation, the Polish Law provides (art. 26) that the creditors of a SCE that transfers its registered office from Poland to any other Member State have the right to demand that their claim be protected or satisfied, provided that there is a probability that the satisfying thereof is endangered by the transfer of the registered office. It is necessary indeed to indicate the concrete circumstances that make this danger real.

The provisions of art. 73 of the Regulation obligate national legislators to take appropriate measures in order to oblige the SCE to regularise the situation when its head office is located in a different state than the registered office (art. 6 of the Regulation). The meeting of that obligation is provided by the provisions of art. 30-32 of the Law, based to some extent on the provisions of art. 24-26 of the Law on the National Court Register. The provisions of the Code of Civil Procedures on non-litigious proceedings adequate in that scope apply to the matters not regulated in the provisions mentioned above.

The system of employee involvement stipulated by the Law is motivated by the implementation of the provisions of the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for the SCE with regard to the involvement of employees.

The key role in setting down the rules of the employees' involvement in SCE is played by a special negotiating body appointed according to the provisions of chapter 1 of section 2 of title III of the Law. This chapter contains the regulations concerning the tasks of the special negotiating body as well as the mode of its formation.

The Directive in art. 3 provides that the members of the special negotiating body may be elected or appointed to exercise this function. The Polish Law proposes the system based in general on the appointment and in case when the appointment is not possible, on the election.

The Law implements the stipulation of the Directive (art. 3 par. 2 p. b of the Directive) providing that the Member State should ensure to the representatives of the trade unions the opportunity to be members of the special negotiating body, whether or not there are employees of the legal entity participating in the formation of the SCE. Therefore, art. 41 p. 5 provides the possibility to appoint or elect to the special negotiating body the representatives of the trade unions organizations accredited as representative on the basis of the law of 6 July 2001 on the Tripartite Commission on Social and Economic Issues and the *voivodship* [regional] commissions on social dialogue, who are not employees of the enterprise in question, but are recommended by these organizations. However, the provision of art. 41 p. 6 of the Law is of great importance hereby, stipulating that the employees should be in a majority in the body.

The provisions of the Directive with regard to the employment of workers are set down in a mode obligatory for all and do not leave any discretion to the national legislators. The law ensures the protection of the level of abilities mentioned in the Directive concerning the employment and participation of the employees in the bodies of the entities. The right to such participation accruing to the employees may be excluded – according to the standard rules – in one case only, i.e. when prior to the registration of the SCE, the rules regarding the participation were not used in any of the entities participating in the formation. Moreover, there is a binding rule, that the right to elect or appoint the representatives of employees to the bodies of a SCE, or other forms of employee participation, accrue to them according to the highest proportion existing within the participating legal entities prior to the registration of the SCE.

The key of the division of the places in the bodies of the SCE according to the geographical criteria as well as among respective enterprises included to the scope of the SCE in each state is also defined. In both cases it should occur in proportion to the number of employees (in the respective state, in each enterprise on the territory of the respective state). The body that makes the division of mandates shall be the representative body.

The Polish Law, in section 4, sets down, according to art. 10 of the Directive, the objective scope of the interdict of revealing particular information, the right to refuse in particular cases to transmit such information by the administrative organ of the SCE and the modes of action for confidentiality of information or refusal of transmission thereof.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The Regulation (art.78 par. 2) imposes on Member States the obligation to designate the authorities competent to execute control and to issue certificates – this may be the court, notary or an administrative board. Polish Law grants that competence to the competent register court according to the location of the registered office of the cooperative participating in the formation of the SCE by merger (art. 4 s. 2).

1.4. Essential bibliography

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Piechowski A. (Ed.), *Spółdzielnia europejska – szansa integracji i rozwoju spółdzielczości w Europie* [A European Cooperative Society – an opportunity for the integration and development of the cooperative movement in Europe], Krajowa Rada Spółdzielcza, Warszawa 2008.

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Trzaskowski R., *Spółdzielnia Europejska* [The European Cooperative Society], Instytut Wymiaru Sprawiedliwości, Warszawa 2004.

Wrzołek-Romańczuk M., *Rozporządzenie w sprawie statutu SCE* [Regulation on the Statute for a European Cooperative Society], Zeszyty Naukowe WWSE, Warszawa 2003.

Zakrzewski P., *Spółdzielnia Europejska jako nowy typ osoby prawnej* [The European Cooperative Society as a new type of legal person], Kwartalnik Prawa Prywatnego nr 1, 2008 p. 1.

NB. None of these books/articles were translated into English.

2. A comment on the implementation of the SCE Regulation in Polish legislation

The draft national Law on the European Cooperative Society was submitted to a social consultations process and evaluated by the representative trade union organizations and employers organizations, i.e. NSZZ "Solidarność" (Independent Self-governing Trade Union "Solidarity"), OPZZ (All-Poland Alliance of Trade Unions), Forum Związków Zawodowych (Trade Unions Forum), Business Centre Club – Związek Pracodawców (Business Centre Club – Employer's Union) and Polska Konfederacja Pracodawców Prywatnych "Lewiatan" (Polish Confederation of Private Employers "Lewiatan") as well as by Federacja Konsumentów (Consumers' Federation).

The draft was also sent to other trade organizations that conduct business activities (Krajowa Izba Gospodarcza – Polish Chamber of Commerce, Związek Banków Polskich – Polish Bank Association). Moreover, the draft was consulted with the cooperative representative organizations, i.e. Krajowa Rada Spółdzielcza (National Cooperative Council) and Krajowa Spółdzielcza Kasa Oszczędnościowo-Kredytowa (National Association of Cooperative Savings and Credit Unions). The draft was also inserted into the web-page of the Ministry of Justice.

The passage of the Law on 22 July 2006 meant that Poland was among the first EU countries that implemented the EU Regulation into its legislation.

Shortly after the passage of the Law, in autumn 2006, the National Cooperative Council published a book "The European Cooperative Society. Origin, legislation, opportunities to establish in Poland" including the full text of the SCE Regulation, Directive, Polish Law as well as commentaries thereof by the experts, supplemented by the texts of the ILO Recommendation No 193 and EU Communication on the Promotion of Cooperative Societies in Europe. The book was distributed mainly among interested cooperators.

On 22 June 2007 The National Cooperative Council together with the Faculty of Law and Administration of the Cardinal Stefan Wyszyński University of Warsaw (one of the leading Catholic Universities in Poland) organized a conference "European Cooperative Society – an opportunity for the integration and development of the cooperative movement in Europe". The papers presented by the experts on legislation and cooperative movement concerned the issues like the origins and position of the Regulation in EU legislation, the comparison of the Law on SCE and Polish Companies Act, employees involvement in a SCE, review of the cooperative movements in EU, etc. The proceedings from the conference were published in 2008.

The National Cooperative Council also made other attempts to disseminate the idea of ECS, such as presenting the opportunities given by the Law and Regulation at several conferences, seminars or training courses concerning particular sectors of the movement (mainly agricultural cooperatives) or some specific or general issues of the movement (cooperation among cooperatives, cooperative audit, new fields for cooperatives' activity, etc.).

There have been in practice no other serious initiatives (taken by other organizations or governmental agencies) aiming at popularizing SCE; only a few short publications, having an informational character, appeared on the market.

The result is that cooperators – our talks and meetings with several cooperative leaders and experts of various sectors and regions of Poland proved it – are more or less aware of the existence of this new legal form as SCE, of the possibility to set up it, but it is rather a general knowledge with no details. The interviewed experts were stressing that the SCE confirmed the importance of the cooperative principle of the priority of a person over capital ("one member – one vote") and of the lack of private responsibility of the members for the financial liabilities of the SCE. They were aware that the SCE form of a business activity would give larger opportunities to use market contacts, to the exchange of knowledge and new technologies and to look for new sources of financing. It seems that some of the Polish cooperative sectors could be potentially interested in establishing SCEs or acceding to a SCE registered abroad. These are dairy cooperatives, cooperative banks, some of workers', farmers', consumers' cooperatives that conduct relatively big, efficient enterprises and made in recent years a huge progress in modernizing themselves, adjusting to EU standards and expanding on foreign markets.

Nevertheless we have not identified any SCE registered in the Polish National Court Register, nor Polish associates of any SCE registered abroad thus far. We found only few information about some very blurred concepts of establishing an SCE, but in no case any concrete organizational action has been taken.

The absence of setting up initiatives does not result from the shortcomings or mistakes in the Law itself; however, the complicated provisions concerning employee involvement are weakly understood and seem to be rather discouraging. The main reason is the lack of larger business contacts of Polish cooperatives with their European counterparts – if such contacts do exist, they concern rather non-cooperative forms of business abroad. This is accompanied by the conservative way of thinking of many cooperative managers, the lack of interest in searching new markets, also – last but not least – by the weak knowledge of foreign languages. Such status is typical not only for cooperatives, but also for several other types of small and medium enterprises. In the case of cooperatives it is even more visible as result of – among other factors – the average age of many cooperative leaders. The reconstruction of the whole internal (national) system of supporting business activity is required in order to motivate people to begin a more active cross-border business exchange.

The assumption that coming into force of the Law should have a positive impact on the regional development, labour markets and infrastructure development has not been confirmed by the hitherto practice. Despite the fact that the directions of the cooperative movement's development in Europe are perceived as forms of business activity contributing to maintain local employment, ensuring the access to local services and thereby they may prevent the depopulation of the rural areas and favour the development of poorer areas, in Poland this view has not been adequately appreciated thus far. One of the main barriers in local development is the lack of capital in economically and infrastructurally weaker agricultural regions; even though they have a well developed structure and good tradition of agricultural cooperation, the abilities of cooperatives to gain an additional foreign capital are still unrealistic because of the fiscal system in force.

The National Cooperative Council intends to begin in a short time some activities aiming at a complex review of the issue mentioned above and at formulating some recommendations. However, it already seems to be sure that the revision and possibly the supplement of the legal provisions that regulate at present the cooperative sector will be firstly required. This concerns mainly the fiscal legislation.

3. Overview of the national cooperative law

3.1. Sources and legislation features

Cooperatives in Poland are subject to the regulations that have rank of a law. There are specific laws that regulate such matters as founding, duration, changes and ceasing of a cooperative, in particular as far as the societal aspect is concerned, but in the period of the cooperative existence other laws also apply that regulate detailed questions regarding all matters connected with the activity of an enterprise irrespective of its legal form (e.g. provisions of the labour law, provisions on industrial security, provisions on personal goods of the entrepreneur, specific technical provisions, rules concerning concluding of agreements, judicial provisions, provisions on bankruptcy and righting procedures, etc.).

The provisions of the cooperative law are civil law provisions and constitute a *lex specialis* in respect to the civil code.

The system of the legal regulations concerning exclusively cooperative organizations is composed by:

- Law – Cooperative law of 16 September 1982,
- Law on cooperative credit and savings unions of 14 December 1995,
- Law on the functioning of cooperative banks, their associations and associating banks of 7 December 2000,
- Law on agricultural producers' groups, their associations and on the change of some other laws of 15 September 2000,

- Law on housing cooperatives of 15 December 2000,
- Law on social cooperatives of 27 April 2006,
- Law of 22 July 2006 on the European Cooperative Society.

NB. None of these acts was translated into English.

Regardless of specific laws mentioned above, the Cooperative law, except for its general part concerning all types of cooperatives, has three specific parts.

The first part concerns cooperatives active in the agricultural production sector and workers' (labour) cooperatives.

The second one concerns secondary cooperative organizations like auditing unions as well as business unions of cooperatives (so called cooperatives of legal entities of second level) concluded exclusively among cooperatives.

The third part concerns the national representation of the cooperative movement – the National Cooperative Council.

There is a general rule that in the provisions of specific laws mentioned above the declaration that this law regulates the principles of founding, conducting activity, mergers or liquidation of a cooperative (e.g. housing cooperatives, social cooperatives etc.) is followed by a proviso that in the extent of matters that are not regulated in this (specific) law, the provisions of the law of 16 September 1982 Cooperative law apply to the cooperatives.

3.2. Definition and aim of cooperatives

The general definition of a cooperative resulting from the cooperative law is:

"The cooperative shall be a voluntary association of unlimited number of persons, with a variable personal composition and variable share capital, that in the interest of its members conducts a joint business activity.

A cooperative may conduct a social as well as an educational and cultural activities in favour of its members" (Cooperative law).

This definition has a universal character and applies to all types of cooperatives.

Specific sectoral laws contain more precise determinations.

The law on housing cooperatives stipulates that:

"*The purpose of a housing cooperative shall be to meet housing needs as well as other needs of its members and their families by providing them separate dwellings or single-family homes as well as premises of other objectives*".

The law on social cooperatives underlines in addition that:

"A social cooperative acts in favour of:

1) *social reintegration of its members, what is meant by activities aiming at rebuilding and maintaining abilities to participate in the life of their local community and to play social roles in the places of their labour, living or staying,*
2) *professional reintegration of its members, what is meant by activities aiming at rebuilding and maintaining abilities to provide self-dependently labour on the labour market*

and these activities are not performed in the frameworks of business activity conducted by the cooperative".

The law on cooperative credit and saving unions indicates the following purpose:

"The purpose of the unions shall be to rise the financial resources exclusively of their members, to grant them loans and credits, to conduct their financial accounts on their orders and to intermediate in concluding insurance agreements on the terms defined in the law of 28 July 1990 on the insurance activity".

In the case of agricultural productive cooperatives it is the Cooperative law itself that stipulates that:

"The purpose of the activity of an agricultural productive cooperative shall be to conduct a collective farm and to perform operations in favour of individual farms of its members".

And in the case of workers' cooperatives:

"The purpose of business activity of a workers' cooperative shall be to conduct a collective enterprise based on the labour provided personally by its members".

3.3. Activity

In general, dealing with non-members is not limited.

However, some limitations can be found in the case of workers' cooperatives, agricultural productive cooperatives and housing cooperatives.

The Cooperative law stipulates that a workers' cooperative (this concerns also social cooperatives) and its members are obliged to remain each other in labour relation. In case when the fact of not establishing labour relation is culpable by the cooperative, the member may vindicate to concluding the cooperative labour agreement during the whole period of his membership duration.

In addition, the cooperative shall not refuse to accept as a member any worker who is employed on the basis of a labour agreement for a period longer than 12 months, if he fulfils statutory requirements and the cooperative has the possibility to continue his employment.

In agricultural productive cooperatives, indeed the purpose of their activity is to conduct a collective farm and operations in favour of individual farms of their members.

In housing cooperatives, dealing with non-members was further mostly limited as dwellings assignment according to cooperative rules (i.e. the value of a member's

expenditure is in line with the cost without profit) shall not occur in relation to the person who are not members, and in addition, the cooperative, by virtue of law, has to meet housing needs as well as other needs of its members and their families by providing them separate dwellings or single-family homes as well as premises of other objectives.

There are no other limitations. The cooperative and the persons who are not its members may conduct a free economic turnover.

The cooperatives may decide about the objective of their business activity on the same principles as all other national and foreign entities. However, some kinds of activities are subject to control regulations by the necessity of receiving concession (e.g. arms production, mining, personal transportation, health services), but the granting of such concession depends only on fulfilling the required conditions and not on the organizational form of the company.

3.4. Forms and modes of setting up

A cooperative is set up voluntarily.

The stages of incorporation procedure:

- Decision to set up a cooperative by a concrete group of persons, adoption of the draft statutes (articles) and then passage of the statutes at the constituent meeting.
- The founders sign the statutes passed by them.

The agreement on incorporation of a cooperative is valid only when the last signature complementing the minimum number of founders required to set up the cooperative is put on the statutes.

The signature on the statutes may be put by a proxy.

- The election of the cooperative's bodies, whose election falls, according to the statutes, within general assembly's or organizational committee's (counting no less than three persons – art. 6 par. 1 *in fine* Cooperative law) competence.

Neither the organizational committee, the supervisory council, nor the board of directors elected by the founders are bodies of the future cooperative, but only the representatives of the founders appointed to the acts in the interest of the cooperative being in the stage of incorporating.

- Submitting to the Register Court the application for registration the cooperative in the National Court Register.
- Taking decision by the court on enrolling the cooperative into the National Court Register and making that enrolment.

The cooperative acquires the juridical personality in the moment of its enrolment to the Register.

3.5. Membership

The minimum number of members shall be 10 natural persons or 3 judicial persons. When both natural and judicial persons are members, the minimum number shall be 10 persons (art. 15 of the Cooperative law).

In the case of agricultural productive cooperatives, the number of members-natural persons shall be no less than 5 persons (art 6 par. 2 of the Cooperative law) or two judicial persons (founders).

In social cooperatives the number of members shall be no less than 5 persons, but no more than 50 persons.

Any natural person who has full capacity to any legal transactions, and who fulfils the requirements stipulated by the statutes, may be a member of a cooperative, unless the law provides otherwise.

The limitations resulting from the law are as follows:

- Social cooperatives – the membership in a social cooperative may be acquired also by other persons than unemployed, requiring social assistance, or disabled ones, when they have some special qualifications required by the functioning of the social cooperative, other members have not; however, the number of such persons shall not be higher that 50% of the total number of the members.
- Agricultural productive cooperatives – only farmers being legitimate owners, beneficial occupiers, tenants, users or other kind of possessors of land may be members of agricultural productive cooperatives. However, the membership of other persons having qualifications useful to the work in the cooperative is admissible by way of exception.

Polish Cooperative law does not provide any institution of membership as a form of conducting capital investments as in case of the commercial law companies. The key premise that decides on acceding to a cooperative shall be always the member's will to satisfy his own individualized personal needs as employment, joint conducting of a larger-scale farm, construction of dwellings and commercial premises, banking services, etc.

Admission of new members means acceding by them to the agreement that already exists. The acceding persons indeed have to confirm in writing that they accept the terms of the agreement.

It is the board of the cooperative that decides on admission after finding whether the candidate fulfils the statutory requirements (whether he is able to work, has a farm, is unemployed in case of a social cooperative, intends to participate in a housing investment, etc.). Polish law excludes any possibilities to refuse the admission by adducing as its reason the race, citizenship, religion, membership in political organizations and other reasons taken commonly as unconstitutional.

In principle the refusal of admission is not actionable except for the provisions concerning workers' cooperatives (employment longer that 12 months) and housing cooperatives (acquiring the title to a dwelling that is not separate property).

3.6. Financial profiles

Each cooperative shall maintain two main capital funds.

The reserve capital – which reflects the value of the assets of the cooperative as a legal person and is undividable during the whole period of the cooperative's existence.

The share capital – being the sum of the individual members' payments and is distributed back to the members in case of ceasing their membership.

It is also possible to establish other purpose or reserve funds. Their existence must be provided by the cooperative's statutes and the source of their supply is balance surpluses (art. 77 par.2).

The legislation being in force in Poland does not make any general requirements regarding the minimum capital for the incorporation of a cooperative (Cooperative law).

The law stipulates only that the founding capital shall be composed by the shares paid by the members. It is indeed compulsory to fix the value of a single share in the statutes. The statutes may also decide about the duty to pay more than one share. It is also admissible to fix the maximum limit of the number of the shares or the maximum amount of the value of their sum.

The specific regulations concern the cooperative banks, where, depending on their scope and area of activity, the minimum capital funds are fixed as the amounts of 1 million and 5 million Euro.

The law allows the variability of the share capital. Its amount depends on the number of the shares declared and paid by the members as well as on possible retracting the quota by the members resigning from the membership.

The reserve capital, being the reflection of the value of the cooperative as a legal person's assets, may change in connection with business operations conducted by the cooperative. However, the law stipulates that when that capital is lower than the value of the share capital, there occurs a duty to put aside the means from the balance surplus to the reserve capital in the amount not less than 5 percent of that surplus, so long as both capitals become equal.

The rules on the allocation of the balance surplus of a cooperative are fixed by its statutes, but the details of the distribution are decided by the general assembly (art. 77 of the Cooperative law). The distribution of the balance surplus may have form of the share interest remuneration (art. 77 par. 4 of the Cooperative law).

The law – Cooperative law – does not provide any possibility to issue financial instruments. Only art. 20 provides a possibility to use a specific financial instrument –

payment by individually determined persons of contributions in money or in kind on the basis of a special agreement. Such contributions, to be used during a period fixed in the agreement, are destined for covering economic needs of the cooperative, or become the ownership of the cooperative and the value should be refunded in the moment when the agreement is dissolved. The agreement fixes the procedure and rules to appraise the contribution. The member receives an adequate financial remuneration on the title to the contribution he paid, in the amount fixed in the agreement.

The obligation to provide financial statements results from the law on accountancy in force since 1994.

The financial statement is composed of:

1) Balance sheet,
2) Profit and loss account,
3) Supplementary information including the introduction to the financial statement as well as supplementary information and clarifications.

The financial statement of the banks should also include:

1) The statement on changes in the capital,
2) The cash flow statement.

The financial statements of the cooperative organizations must be announced publicly, according to art. 89 of the Cooperative law, in the “Monitor Spółdzielczy” [Cooperative Gazette], published by the National Cooperative Council. Moreover, as all business entities, the cooperative is obliged to deposit its financial statement in the National Court Register, where any citizen may access it. The cooperative is also obliged to enable its members to view the statement laid out in the cooperative’s premises 14 days prior to the date of the yearly General Assembly.

3.7. Organisational profile

Polish law – the civil code – stipulates that any legal person acts throughout its bodies on the way provided by the law and the statutes based on that law. This provision expresses the so called “theory of legal person’s bodies”, according to which individuals who are in the composition of the bodies of any legal person, are appointed to create and implement its will.

The obligatory bodies of any cooperative are:

1) General Assembly/Representatives’ assembly;
2) Supervisory Council, which – according to art. 46 par. 2 of the Cooperative law – may be substituted by a revising committee, and in some cooperatives (e.g. social ones), it is acceptable not to appoint such council as far as the number of members is lower than 20 persons;
3) Board of Directors (management body);

4) Members' Groups Meetings – in the cooperatives where the general assembly is substituted by the Representatives' Assembly.

Facultative bodies may be provided by the statutes usually in the cooperatives that have numerous membership composition, e.g. in the consumers' cooperatives or housing ones. The goals of such bodies are connected with the issues concerning particular categories of members (representatives thereof are appointed to these bodies), resulting in a specific bond that links them, as e.g. place of dwelling, employment in the same enterprise being branch of a cooperative, the kind of agricultural production.

The cooperative's bodies are usually collegial.

However, the statutes may provide that the board is a single body (one person).

The cooperative's bodies are in principle composed exclusively of the cooperative's members. However, exceptionally, according to the statutes, the board of directors (management) may be composed partially or even exclusively of the persons who are not members of the cooperative.

The personal composition of the cooperative's bodies (except the general assembly) is appointed by way of secret ballot of the unlimited number of members-candidates.

The voting and passing resolutions at the general assembly runs according to the principle "one member – one vote". The only exception of that principle are cooperatives whose members are exclusively legal persons. The statutes of such cooperatives may provide a different principle of fixing the number of votes granted to the members.

The system of a cooperative's governance in principle provides that the management of its business is entrusted to the board of directors. However, that principle is fully implemented only in the executive sphere. In the decision-making sphere many issues are reserved to the competences of the supervisory council or general assembly and the board must not take any executive actions self-dependently. Among these issues are in particular the decisions regarding the matters of high financial impact (e.g. vending or encumbering real properties), fixing the upper limit of financial liabilities the board is entitled to take self-dependently decisions on, joining other business and social organizations, establishing cooperative unions, fixing the final organizational structure of the cooperative.

The organizational system may also provide the managing of current business activity by a manager employed especially with this end in view. In such a case the statutes must determinate with a binding effect in which matters the board exclusively is authorized to take decisions by way of resolution. This is the, so called, stipulation of the limit of the normal board's matters.

The Cooperative law also provides for the cooperatives the possibility of acting throughout a proxy appointed especially to this end. He may have a particular proxy to represent individually the cooperative in the scope fixed by the resolutions adopted by its bodies. The statutes may reserve the right to approve the appointment of a proxy to the competences of the supervisory council.

External audit

Regardless of the possibility to conduct an internal audit of a cooperative (see art. 88a s. 1 of the Cooperative law stipulating on rights and duties of the supervisory council), the Cooperative law introduced the institution of the cooperative audit.

The cooperative audit, or the inspection of the legality, reliability and the efficiency of the cooperative's management, is conducted by the experts who have suitable certificates granted by the National Cooperative Council. The record of the auditing inspection has virtue of an official document.

The auditing inspection should be conducted every three years. It also may be initiated occasionally on the motion of the cooperative's members.

The cooperatives reaching high financial profits specified in the law on accountancy are obliged, as other enterprises, to submit their financial statements to the control of external certified auditors. The record of the control is deposited in the tax offices.

Such control and public announcement (art. 64 of the law on accountancy) concerns annual consolidated financial statements of the capital groups and annual financial statements of other business entities that continue their activity, and in particular:

- cooperative banks,
- other enterprises, that in the previous business year fulfilled at least two of three following conditions:
  1) the average yearly employment (recalculated on full-time jobs) was no less than 50 persons;
  2) the sum of the assets of the balance sheet at the end of the year was the equivalence in Polish currency of no less than 2,500,000 Euro;
  3) the net revenues from the sales of goods and products as well as financial operations in the previous business year were equivalent in Polish currency to no less than 5,000,000 Euro.

3.8. Registration and control

All cooperatives incorporated in Poland, in order to receive the status of a legal person and the ability to conduct an enterprise, must be revealed in the National Court Register in the section dedicated to enterprises (art. 11 s. 1 ps).

The rules governing the registration and the manner of conducting the register of entrepreneurs is regulated by the law on the National Court Register of 1997.

The information included in the register is overt for any interested persons who shall have access to review it by examining the acts or photocopies of the documents deposited in the court territorially competent for the location of the cooperative. It is also possible to receive the information digitally.

The catalogue includes the following documents of any cooperative:

- the incorporation deed, statutes, if they are in the form of separate acts, as well as the resolutions on their changes;
- consolidated texts of the documents mentioned above;
- resolutions on appointment and deprivation of the members of the cooperative's bodies;
- annual financial statements and annual consolidated financial statements of the capital groups within the meaning of the regulations on accountancy, copies of the resolutions on the approval of the annual financial statements and profit distribution or covering of loss, as well as the opinions of certified auditors and reports on the activity of the enterprise, when the obligation to make them results from specific regulations.

The enrolments to the Register must be announced in the "Monitor Sądowy i Gospodarczy" [Court and Business Gazette]. Since the day of publication nobody can plead ignorance of the enrolments already announced.

In case of the SCE the following supplementary information is revealed in the Register:

- the amount of the company (subscribed) capital, the number and nominal value of shares,
- if the members make non-financial contributions – such fact must be mentioned with the specification of the nominal value of the shares allotted to these members against their contributions; this does not concern any SCE transferring its registered office to the territory of the Republic of Poland,
- when the statutes indicate the gazette destined for the announcements of SCEs – the indication of such gazette;
- the mention on the resolution on the issuing of bonds.

The control of the cooperatives

The control of the implementation of the purpose of a cooperative's activity, its thriftiness, reliability, righteous treatment of membership issues is subject, before all, to the inspection executed in the frameworks of cooperative organizations themselves, i.e. internal audit (by supervisory council) or external audit (audit conducted by auditing unions of cooperatives).

The external control (executed by approved state authorities) may be conducted only in the common scope, same as in the case of other business entities regardless of their legal-organizational form, i.e. in the scope of fiscal law, labour law, specific technical requirements connected in particular with machinery and equipments dangerous to the workers' life.

3.9. Transformation and conversion

Polish Cooperative law does not provide any possibility to convert a cooperative into any other legal form of enterprise.

By way of interpretation presented in the judicial decisions of the Supreme Court, one can only assume that such conversion may occur, but exclusively in train of the liquidation process. The liquidation of the cooperative indeed must precede the process of the transfer of the assets as well as the rights and liabilities upon the new organizational form. It means that the assets residual after the liquidation may be transferred upon the new organizational form after having discharged all liabilities. It is the general assembly that decides thereupon by the majority vote.

3.10. Specific tax treatment

Cooperatives are not subject to any specific tax treatment. Standard treatment, the same as in the case of companies and enterprises applies, i.e. the act on legal persons income tax.

3.11. Existing draft proposing new legislation

At present, Polish Parliament does not work on any new legislative drafts concerning cooperative law.

Some more or less advanced attempts to pass a new cooperative law in the years 1990 – 2008 unfortunately failed, because of various reasons and in general as result of the lack of interest of politicians to tackle seriously that problem. So only several amendments and changes of the existing law of 1982 as well as some sectoral regulations mentioned earlier were adopted.

Recently, in 2009, a joint commission of the governmental (coming from several ministries) and cooperative representatives has been appointed. The result of its works is the “Report on Polish cooperative movement” adopted in 2010. This gives the hope that the issue of drafting a new cooperative law will be again found on the agenda of the legislative activity in Poland.

3.12. Essential bibliography

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NB. None of these books/articles were translated into English.

4. The SCE Regulation and the national law on cooperatives

The adoption of the Law on SCE did not require any meaningful changes of other national laws. In order to implement the Regulation, Polish legislature had only to:

- supplement the provisions of the Law on the National Court Register that had not considered the existence of any entity of transnational character having a cooperative form thus far;
- exclude the applying of the provisions of the law on the European Work Council in case of SCEs;
- provide the limitations and the right to compensation in regard with dissolving the employment contract with the members of negotiating bodies, representative bodies or representatives of the workers employed in SCEs;
- make changes in the law on European Economic Interest Grouping and European Company (Law of 4 March, 2005) and in particular

- to add new provisions aiming at the implementation of art. 25 par. 2 of the Regulation No 2157/2001, indicating the competent court register as the competent authority,
- to stipulate that the election of the members of the special negotiating body is direct and is held by secret ballot,
- to provide penal provisions concerning sanctions for trespassing against legal obligations by the members of the boards of directors, the administrative councils or by the managing directors with the reservation that they concern SEs.

The implementation had no impact on the national cooperative legislation either. However, one must not preclude that in the case of appearing of a SCE in Poland, the regulations provided in the Law on SCE will find a profounder application in Polish Cooperative law. At present we can discuss that matter only theoretically.

From the point of view of Polish cooperatives, the one-tier system of governing could be probably interesting to them, as cumulating in the frameworks of one body both managerial and supervising competences. This results from the fact that many Polish cooperatives have so few members, that it is almost impossible to appoint or elect the members of the supervising bodies from among the cooperative's members who have sufficient qualifications to such function. The one-tier system could facilitate the appointment of external professionals, which indeed already occurs in the form of the employed management.

Another interesting opportunity could be the possibility to issue priority stock as a source to gain additional financing for cooperatives. Admittedly, Polish Cooperative law provides such possibility of strengthening a cooperative finances by the institution of contributions in capital or in kind (art. 20 of the Cooperative law), but these are not the instruments that may be the subject of any commercial transactions. They only constitute a kind of economic link between a member and his cooperative. After the contribution has been paid, the member is not able to make any transactions thereof value.

Polish cooperative movement is in a difficult, transitional period. For over 40 years, in the former system, cooperatives were the sole important business form that was not 100 percent controlled by the government as other sectors of the economy were. The movement was organized in a hierarchical system where secondary structures strongly affected single societies and deprived their bodies of the freedom of an action. At the same time, cooperatives had several fiscal and business privileges (as exclusiveness to produce specific goods or services). When the political, economic and social system had changed, the cooperative movement was forced to take a chance of a strong competitive struggle. Too often the members were not accepting new solutions. The supervisory councils had problems to find their position towards boards of directors in the new business reality when prompt decision-making was necessary. Many "traditional" partners and markets were lost.

The Cooperative law had been drafted in 1982 and was not amended or changed meaningfully in regard to the provisions regulating business activity. They remained in general unchanged and as the Cooperative law is a *lex specialis* in respect to the commonly binding regulations, cooperatives are not able to use such instruments as issuing priority stock, which weakens their competitiveness. The Law on SCE, which introduces a new form of business entity combining traditional cooperative values and principles with modern business efficiency, although no such cooperatives have been set up in Poland thus far, may contribute to changing the way of thinking on cooperatives and – as we do hope – to draft a totally new, modern Cooperative Law adequate to the requirements of Polish economic and social life in the frameworks of the European Union.

PORTUGAL

By Jose Antonio Rodrigues

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Portuguese legislation. – **1.1.** Source, time and modes of implementation. – **1.2**. Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg.. –**1.4.** Essential bibliography. – **2.** Comment on the (non) implementation of the SCE Regulation in Portuguese legislation. –**3.** Overview of Portuguese cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of the SCE Regulation 1435/2003 in Portuguese legislation

1.1.Source, time and modes of implementation
1.2.Structure and main contents of the regulation

As it has been described in the interim report, Portugal has, at a European level, one of the most complete legal structures for the cooperative sector – one Cooperative Code, completed with 12 specific laws for the 12 different types of cooperatives defined in the Code. Also having, in addition: one specific law for cooperative *"régies"*, one specific tax law for cooperatives, completed with a specific law to regulate the collection of VAT applicable to agricultural cooperatives, one regulation for financial assistance to cooperatives (investment and creation of jobs).

In what concerns the Regulation of the European Cooperative Society, however, **the Portuguese Government has, till now, considered that it was not necessary to implement the Regulation** - implementation that could be made by the approval of a specific law, or by some modifications in the Cooperative Code.

About the articles of the Regulation which give an option to the Member States or that impose an obligation to take measures of implementation, having no specific law, we can see the internal solutions – "Cooperative Code" and "Code of Commercial Registration" – and also the solutions we have adopted for the European Society (SE), although, in other situations – more specific of the cooperative "model", we must wait for the implementation law and see the solution that will be given.

Article 6 – There is no tradition in the Portuguese company law to make a distinction among "the head office" and the "registered office". So, I tend to think that Portugal will use this option.

Article 7, par. 7 – When there is a scission or a merger of cooperatives, the Cooperative Code imposes that these acts will only be effective – and registered – after the demonstration that the interests of creditors and members are adequately protected. So, the same solution will be adopted for SCEs.

In what concerns legislation favouring public entities – Fiscal Administration, Social Security – Portugal has such legislation, but it is only applicable under a court decision.

Article 14, par. 1 – The Portuguese Cooperative Code does not permit investor members.

Article 21 – This possibility shall be regulated by the competition law. So, the "Competition Authority" will be the authority in charge of this kind of control.

Article 35, par. 7 – The Cooperative Code does not allow the conversion of cooperatives in different types of societies. So, we will have to create a specific regulation for SCE.

Article 37, par. 1 / Article 42, par. 1 – This is an existing option for Portuguese cooperatives. It´s foreseeable to extend it to SCEs.

Article 37, par. 2 – The members of the management organ of Portuguese cooperatives are appointed and removed by the General Assembly. So, this option will be probably used in SCEs.

Article 37, par. 3 – In a vacancy situation in the management organ, the Cooperative Code does not foresee the nomination of a member by the supervisory organ. The solution is, normally, to call for an elected substitute.

Article 37, par. 4 – In the Cooperative Code there is no maximum number of members for the management organ. Small cooperatives (up to 20 cooperators) can have only 1 board member. The other ones have 3 or more board members.

Article 37, par. 5 / Article 42, par. 4 – Portuguese cooperative law already allows the two-tier system to agricultural credit cooperatives. I think that the possibility will be extended to SCEs.

Article 39, par. 4 – Same situation as for the management organ (see above, article 37, par. 4).

Article 40, par. 3 – It is the situation we have now in the Cooperative Code. The rights to information can be used by the organ, or individually, by each member of it.

Article 42, par. 2 – See above, article 37, par. 4. About the representation of non-user members, we don´t have this kind of member in the Portuguese law.

Article 47, par. 1 – The law applicable to this situation is the Cooperative Code, which has a similar rule.

Article 59, par. 2 – Portuguese Cooperative law does not give the possibility of multiple votes in first degree cooperatives.

But we can have a system of multiple votes if the members of the cooperative are exclusively cooperatives. In my opinion, it shall be extended to SCEs.

Article 59, par. 3 - The Portuguese Cooperative Code does not permit investor/non-user members.

Article 59, par. 4 – The Portuguese Cooperative Code does not permit the participation of employee´s representatives in the General Assemblies. If employees are also members, they will participate, but "as members". Portugal will not change this situation.

Article 61, par. 3 – Cooperative Code does not allow investor members. So, the rules that apply to SCE under Portuguese law, about quorum and majority requirements, are those that are applicable to Portuguese cooperatives, according to the Code:

Quorum for the General Assembly: In first call, 50% + 1 of the cooperators; in second call, any number of cooperators – the statutes can stipulate a different solution.

Majority requirements to have a valid deliberation of the General Assembly:

Rule – 50% + 1 of the votes.

Special matters, as modification of the statutes, liquidation of the cooperative, merger, division – 75% + 1 of the votes - or a more exacting majority, stipulated in the statutes.

Article 71 – Portugal still has this regime for bigger (economically) cooperatives.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

Here again, as we don´ t have a specific law implementing the SCE Regulation, we take in consideration the internal solutions – "Cooperative Code" and "Code of Commercial Registration" – and also the solutions already adopted by the European Society (SE). So, the designated national authorities shall be:

For **Article 7** – A Notary;

For **Article 21** – The Competition Authority;

For **Article 29** - Commercial Register Office/Justice Ministry;

For **Articles 30 and 73** - Commercial Register Office/Justice Ministry plus competent courts to judge actions based on the exercise of corporate rights;

For **Article 54** - Competent courts to judge actions based on the exercise of corporate rights.

1.4. Essential bibliography

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2. Comment on the (non) implementation of the SCE Regulation in Portuguese legislation

As it was said before, Portugal has not implemented the SCE Regulation, creating a new law or making some changes on the existing laws.

We don´t have "scientific" explanations for this option. However, we can point to some explanatory reasons.

Let´s start with the "political" importance of the cooperative sector.

After the introduction of democracy in Portugal, in 1974, we had a very significant growth of the cooperative sector. Quickly, we spread the number of cooperative units from a few hundred to about 3.000.

But the cooperative sector that "was born" after 1974 was associated with an image of a political identification with the left parties. In some types of cooperatives – workers, cultural, for instance – this identification remains. For this reason, the relationship between the cooperative sector and the government balances between a close relation, with the approval of support policies, and an indifferent relation.

We had two Government periods of a close relation between the cooperative sector and the political power: 1980/1982 and 1995/1997. In the last 10 years it is obvious that the Government does not consider this sector relevant. So, a law implementing the SCE Regulation is not a "first (or a second, or a third …) priority".

On the other hand, we have a weak cooperative sector, in economical terms, with some exception in agricultural – milk, wine, olive oil – sectors and agricultural credit activities. Considering this weakness, Portuguese cooperatives do not have a great propensity to get involved in international business projects. The potential of the SCE is a reality to which cooperatives are not sensitive. This can also be one reason why the cooperative sector "actors" – federations, confederations – do not press the government in order to implement the SCE Regulation.

Finally, the geographical situation of Portugal does not motivate the option for the country as head office of SCEs.

3. Overview of the Portuguese cooperative law

3.1. Sources and legislation features

As it was indicated in the interim report, Portugal has a complete legal structure for the cooperative sector – one Cooperative Code, completed with 12 specific laws for the 12 different types of cooperatives defined in the Code. In addition, Portugal also has one specific law for cooperative *"régies";* one specific tax law for cooperatives, completed with a specific law to regulate the collection of VAT applicable to agricultural cooperatives; and one regulation for financial assistance to cooperatives (investment and creation of jobs).

All this legal *building* is not concentrated in the same, or in an approximate, period. We still have special laws from the beginning of the 80s, published after the approval of the first Cooperative Code, in 1980 – for instance, special laws regulating production cooperatives, fisheries cooperatives, handicraft cooperatives. We have special laws published after the approval of the present Cooperative Code, in 1996 – for instance, special laws regulating housing cooperatives, consumer cooperatives. Finally, we have a law regulating a recent cooperative "branch" – social solidarity cooperatives, from 1998:

- Cooperative Code – from 1996, a law from the Parliament, applicable to all kinds of cooperatives.
- Special law for agricultural cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1999.
- Special law for handicraft cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1981.
- Special law for commercialization (retail) cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1999.
- Special law for consumer cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1999.
- Special law for agricultural credit cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1991, with several modifications.
- Special law for cultural cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1981.
- Special law for education cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1982.

- Special law for housing cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1999.
- Special law for fisheries cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1981.
- Special law for production (workers) cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1981.
- Special law for services cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1981.
- Special law for social solidarity (care) cooperatives, completing and developing the Code in what concerns this special cooperative branch – law (Government initiative) from 1998.
- Special law for cooperative "régies" – law (Government initiative) from 1984.
- Law, from Government, from 2009, that terminates Public Institute "INSCOOP" and creates a cooperative "régie", with the same, or a similar, purpose.
- Cooperative tax law – a law from the Parliament, from 1998.
- Special tax law for exigency of IVA (VAT) to agricultural cooperatives - law (Government initiative) from 1999.
- Law from the Parliament, from 2008, with the transposition of SCE Directive 2003/72/CE concerning the involvement of employees.
- PRODESCOOP – Regulation of financial assistance to cooperative investment and creation of jobs - regulation from the Government, from 2000.

3.2. Definition and aim of cooperatives

General definition - Cooperative Code, **Article 2**, Par. 1

"Cooperatives are autonomous legal persons, from free creation, with variable capital and membership, that, through cooperation and mutual assistance of its members, with obedience to cooperative principles, aim, in a non-profit way, to meet the economic, social or cultural needs and aspirations of the members."

Definition and aim – Agricultural cooperatives – Decreto-Lei nº 335/99, August 20th, Article 2

"Are agricultural cooperatives those that aim the agricultural, cattle-raising and forest production, as well as to collect, concentrate, transform, storage and sell the production of the members, to product, buy, prepare and storage raw material and animals to the members exploitations, to provide services to the members and to manage the use of the water resources."

Definition and aim – Handicraft cooperatives – Decreto-Lei nº 303/81, November 12th, Article 2

"Are handicraft cooperatives those that aim, as main purpose, to organize the work of craft men, working in production units in order to transform raw materials or to produce or repair merchandises."

Definition and aim – Commercialization (retail) cooperatives – Decreto-Lei nº 523/99, December 10th, Article 2

"Are commercialization cooperatives those that aim, as main purpose, to buy, storage and sell the products necessaries to the professional activity of the members and or to sell the products produced or transformed by the members."

Definition and aim – Consumer cooperatives – Decreto-Lei nº 522/99, December 10th, Article 2

"Are consumer cooperatives those that aim, as main purpose, to provide the members, and their families, with products and services for their immediate use, in the best conditions of quality and price."

Definition and aim – Agricultural credit cooperatives – Decreto-Lei nº 24/91, January 11th, Article 1 of the Legal Regulation

"Agricultural credit cooperatives are credit entities, created as cooperatives, that aim, as main purpose, to run activities of agricultural credit in benefit of the members, as well as to practice other bank activities."

Definition and aim – Cultural cooperatives – Decreto-Lei nº 313/81, November 19th, Article 2

"Are cultural cooperatives those that aim, as main purpose, to develop an activity in a cultural area."

Definition and aim – Education cooperatives – Decreto-Lei nº 441-A/82, November 6th, Article 2

"Are cultural cooperatives those that aim, as main purpose, the management of a learning institution."

Definition and aim – Housing cooperatives – Decreto-Lei nº 502/99, November 19th, Article 2

"Are housing cooperatives those that aim, as main purpose, to promote, to build or to buy houses for their members, as well as the maintenance, the repair or the refashion of these houses."

Definition and aim – Fisheries cooperatives – Decreto-Lei nº 312/81, November 18th, Article 2

"Are fisheries cooperatives those that aim, as main purpose, the capture, conservation, transformation, storage, transport and sale of live resources from the sea, as well as the extraction, treatment and sale of sea salt."

Definition and aim – Production (workers) cooperatives – Decreto-Lei nº 309/81, November 16th, Article 2

"Are production cooperatives those that aim, as main purpose, the extraction, production and transformation of industrial products."

Definition and aim – Services cooperatives – Decreto-Lei nº 323/81, December 4th, Article 2

"Are services cooperatives those that aim, as main purpose, to provide services, except those which are foreseen in other cooperative laws."

Definition and aim – Social solidarity (care) cooperatives – Decreto-Lei nº 7/98, January 15th, Article 2

"Are social solidarity cooperatives those that, through cooperation and mutual assistance of its members, with obedience to cooperative principles, aim, in a non-profit way, to meet the social needs of the members, as well as their promotion and integration."

3.3. Activity

According to **Article 7** (title: "*Cooperative Initiative*") of the Cooperative Code:

"1. *Provided they comply with the law and the cooperative principles, cooperatives may exercise freely any economic activity.*

2. *Therefore, it cannot be prohibited, restricted or conditioned to cooperatives the access and the exercise of activities that can be developed by private companies or other entities of the same nature, as well as by any other legal persons governed by private law with non-profit aim.*

3. *Are applicable to cooperatives, with adaptations inherent to the specificities resulting from the provisions of this Code and complementary laws, rules governing and ensure the exercise of any activities by private companies or other entities of the same nature, as well as by any other legal persons governed by private law with non-profit aim.*

4. *The administrative acts contrary to the provisions of previous paragraphs or to the principles enshrined therein are injured inefficiency."*

We can say that, presently, the Portuguese authorities respect these principles and the laws that regulate the access to different economic activities ensure the access of cooperatives. In some cases, what we have for cooperatives is a different degree of exigency in what concerns the minimum capital required. For instance, in the insurance sector law, private companies must have a minimum capital of €: 7.500.000 (life or non-life) or €: 15.000.000 (life + non-life), and insurance cooperatives must have €: 3.750.000.

In the last years, we point out a significant progress in this matter. Some years ago, cooperatives were not authorised, by law, to act as travel agencies, or as international transporter of merchandises, for instance.

Nowadays, the only questionable situation we have concerns credit cooperatives.

The law regulating the activity of banks and financial institutions indicates, in article 3, an exhaustive list of credit institutions that are allowed in Portugal. In this statement we only find agricultural credit cooperatives and its central institution – "Caixa Central de

Crédito Agrícola Mútuo". Does this mean that Portuguese law has no provision to other credit cooperatives, than the agricultural credit? Apparently, yes.

In what concerns economical operations with non-members, stipulates **Article 2**, Par. 2 of Cooperative Code:

"*Cooperatives, in pursuit of its objectives, can perform transactions with third parties, without prejudice to any limits established by the laws of each branch*."

The specific laws have no limits stipulated, so the only relevant consequence of operations with non-members is a different taxation regime.

There are also no territorial restrictions, with the exception of agricultural credit cooperatives, that have to indicate in the statutes their geographical area of activity, subject to approval of the Central Bank – Banco de Portugal.

Until the present law, from 1999, agricultural cooperatives were also obliged to identify in the statutes their geographical area of activity.

3.4. Forms and modes of setting up

According to **Article 10** of the Cooperative Code:

"*Constitution of cooperatives of 1st degree shall be reduced to a written act, unless a more solemn form is required for the transmission of assets representing the initial capital of the cooperative.*"

This solution exists since 2006, changing the previous rule, imposing the constitution of some cooperatives (credit, retail, housing, unions and federations) by a constitution title made in a notary.

In the present situation, the notary intervention is only required if, in the constitution of a cooperative, one member subscribes his capital through the transfer of a real property.

3.5. Membership

Minimum number of members is, according to **Article 32** of the Cooperative Code:

"*1.* *The number of members in a cooperative is variable and unlimited, but may not be less than five in 1st degree cooperatives and two in cooperative unions, federations and confederations.*

2. *Complementary law for each branch of the cooperative sector may require, as a minimum, a higher number of cooperators."*

For agricultural credit cooperatives, the minimum number of members is 50.

Some of the cooperative sectors have **specific membership requirements**. It is the case of:

Agricultural cooperatives – Can be members natural persons or legal entities developing agricultural, farming or forestry activities, or related activities, in agricultural exploitations in the geographic area of the cooperative, as well as the owners of these exploitations.

Similar requirement exists in agricultural credit cooperatives.

Commercialization (retail) cooperatives – Can be members legal entities that act in trade or industry sectors and that have their own establishment.

Handicraft, Cultural, Production, Services and Social Solidarity cooperatives – Can be members those who develop a productive activity in the cooperative.

Investor members are not allowed in the Portuguese cooperatives.

Admission of members – New members are admitted by the Management Organ/Administration (the rule) or by the General Assembly if the statutes impose that. The only conditions to admission are to accomplish the specific requirements, if they exist, and to subscribe the minimum capital fixed by the statutes.

3.6. Financial profiles

Minimum capital required for the establishment of a cooperative – According to **Article 18** of the Cooperative Code:

*"**1.** The capital of cooperatives is variable, competing to the respective statutes the determination of the initial minimum amount.*

***2.** Except if another minimum is set by the complementary legislation applicable to each branch of the cooperative sector, this amount may not be less than €: 2,500."*

In this situation, some specific laws of the different branches of the cooperative sector stipulate a different amount for the minimum capital:

Agricultural cooperatives - €: 5.000.

Agricultural credit cooperatives integrated in the common system/SICAM (Caixa Central de Crédito Agrícola Mútuo) - €: 1.500.000.

Agricultural credit cooperatives not integrated in the common system/SICAM (Caixa Central de Crédito Agrícola Mútuo) - €: 7.500.000.

Education cooperatives managing a cooperative university - €: 5.000.

Handicraft, Cultural, Production and Services cooperatives - €: 250.

Minimum capital required for a cooperator to enter a cooperative – According to **Article 19**, Par. 1 and 2, of the Cooperative Code:

"**1.** *The minimum capital entries to subscribe by each cooperator are determined by the complementary law applicable to the various branches of the cooperative sector or by statutes.*

***2.** The minimum entry cannot, however, be less than the equivalent of three shares*."

Stipulates **Article 20**, Par. 1, of the Cooperative Code:

"*The shares representing the capital of cooperatives have a minimum nominal value of €: 5, or a multiple thereof."*

This means that we can consider as minimum capital required for a cooperator to enter a cooperative **€: 15** (3 x €: 5).

Some specific laws of the different branches of the cooperative sector stipulate a different amount for the minimum capital of each cooperator:

Agricultural, Commercialization and Housing cooperatives – Minimum: €: 100.

Agricultural Credit cooperatives – Minimum: €: 500.

Devolution of assets – If a member leaves the cooperative, in case of resignation or expulsion, according to **Article 36**, par. 3 and 4, of the Cooperative Code:

"3. *The cooperator who resigns shall be refunded, within the delay established by statutes or, if no delay is established, within one year, of the amount of the subscribed capital, conducted according to their nominal value.*

4. *The nominal value referred to in the preceding paragraph shall be added with interests entitled for the last financial year, the share of profits and non compulsory reserves that can be distributed, in proportion to their participation, or reduced, where appropriate, in proportion to the losses accused in the balance for the financial year in which the right to reimbursement occurred."*

(the same rule applies to the case of expulsion)

Reserves – All cooperatives are obliged to create a "legal reserve" and an "education and training reserve".

Minimum allocation - Legal Reserve: 5% of the surplus of the financial year. Education and Training Reserve: 1% of the surplus of the financial year.

The complementary laws of the Cooperative Code or the statutes of each cooperative – in this case, after a decision of the General Assembly – can create other reserves.

The agricultural credit cooperative law created a third compulsory reserve, called "mutual assistance reserve", to assist members and employees of these cooperatives – minimum allocation: 5% of the surplus of the financial year.

The education cooperatives working with handicapped students must create a "professional integration reserve" with a minimum allocation of 2,5% of the surplus of the financial year.

The housing cooperative law created two compulsory reserves, called "preservation and repairs reserve" and "building reserve".

The yearly allocation to reserves is decided by the General Assembly.

The compulsory reserves – for sure, those created by law; I consider that the reserves created in the statutes of a cooperative are also "compulsory" for this cooperative – cannot, in any case, be distributed by the members.

In case of dissolution of the cooperative, the compulsory reserves cannot, also, be distributed to the members. In this case, the allocation of the respective amount is made in

benefit of a similar local cooperative, according to the decision of the corresponding cooperative federation.

Stipulates **Article 79** of the Cooperative Code (title: "Allocation of equity under liquidation"):

"1. *Once met the costs of the liquidation process itself, the balance obtained will be immediately applied in the following order:*

a) to pay wages and benefits dues to workers of the cooperative;

(b) to pay other debts of the cooperative, including redemption of investment securities, bonds and other benefits of members of the cooperative;

c) to redeem member´s capital contributions.

2. *The amount of the legal reserve, established pursuant to article 69, which has not been intended to cover any losses and is not likely to different application, will be allocated, with identical purpose, to the new cooperative entity that emerges as a result of merger or division of the cooperative in liquidation.*

3. *When no cooperative entity succeeds to the one in liquidation, the allocation of the remaining reserves reverts to another cooperative, preferably of the same municipality, determined by the federation or confederation representing the principal activity of the cooperative.*

4. *To the reserves lodged pursuant to article 71 of this code shall apply, on the winding-up, and in the case of the statutes do not stipulate differently, the rules established in paragraphs 2 and 3 of this article."*

Distribution of share remuneration (dividends) and profits

Ensured the allocations – minimum defined by law or others decided by the General Assembly – to the existing reserves (compulsory or statutory), cooperatives can remunerate the member shares and/or distribute profits.

However, there are some limits:

Housing and Social Solidarity cooperatives cannot distribute profits.

Education cooperatives are compelled to allocate at least 50% of the surplus of the financial year to compulsory reserves. Also, they cannot remunerate the member shares (dividends).

Cultural, Production and Services cooperatives – The distribution of profits must be in proportion to the work of the members/producers.

In what concerns the distribution of share remuneration (dividends), the total amount cannot exceed 30% of the surplus of the financial year – for all cooperatives.

Issuance of financial instruments

According to **Articles 26**, Par. 1 to 4, and **30**, of the Cooperative Code:

*"**Article 26** - Investment securities*

1. *Cooperatives may issue investment securities, upon decision of the General Assembly, that fix with what objectives and under which conditions the Administration can use their product.*

2. *It may in particular be issued securities investment:*

a) assigning the right to an annual remuneration, including a fixed part, calculated by applying to a fraction of the nominal value of each title a predetermined rate, invariant or reported a reference indicator, and a variable part, calculated on the basis of the results of turnover or of any other element of the activity of the cooperative;

b) assigning to their holders the right to a premium refund, either fixed, or dependent on the results achieved by the cooperative;

c) providing interest and repayment plan varying according to the results;

d) being convertible into shares, provided that the holder meets the conditions of admission legally required for producer or user members;

e) presenting emission premiums.

3. *The investment securities issued pursuant to paragraph (a) of the preceding paragraph shall be reimbursed only in case of liquidation of the cooperative, and only after payment of all other creditors of the cooperative, or, if it so decides, after expiry of at least 5 years on their achievement, under the conditions defined when issuing.*

4. *The investment securities can be subscribed by non-members the cooperative, but the members are entitled to pre-emptive subscription of investment securities convertible into shares."*

"***Article 30*** *- Bonds*

1. *Cooperatives may also issue bonds, as laid down by the code of commercial companies for bonds issued by corporations, whose implementation does not undermine the cooperative principles or the provisions of this code.*

2. *In particular, are not permitted bonds which are convertible into shares or conferring the right to subscribe one or more actions."*

Publicity of financial statements

As opposed to private companies, cooperatives are not obliged to deposit their yearly balance sheets at the Commercial Register Office.

3.7. Organizational profiles

Internal structure of the cooperatives

According to **Article 39**, Par. 1 and 2., of the Cooperative Code:

"1. *Are the organs of cooperatives:*

a) the General Assembly;

b) the Administration (Board of Directors);

*c) the Supervisory Organ**.***

***2.** The statutes may still provide other organs, as well as give power to the General Assembly or to the Administration to create special committees, of limited duration, for certain tasks."*

So, Portuguese cooperatives are structured in the two-tier system.

The agricultural credit cooperatives can opt for the one-tier or the two-tier system, like private companies.

Another exception to the two-tier system is the case of cooperative unions, federations and confederations, stipulated in **Article 84**, Par.2., of the Cooperative Code:

"*If the number of members of the General Assembly is not sufficient to meet the social organs, there will be only a collegiate body, the Assembly of Cooperatives, composed by all members of the Union, which shall act by simple majority, bearing in mind the number of votes that each Member is assigned, in accordance with the preceding article.*"

The organs of cooperatives are composed **only by members** – Management Organ, Supervisory Organ and Chairman and Vice-Chairman of the General Assembly. In agricultural credit cooperatives they can be non-members.

The members of the organs of cooperatives are voted for the period stipulated in the statutes, with a maximum 4 year mandate. Stipulates **Article 40**, Par. 1, of the Cooperative Code:

"*Members of the organs are elected among the cooperators for a period of four years, if a shorter period is not foreseen in the statutes.*"

In the two-tier system:

a) the Management Organ has at least 3 members, the Supervisory Organ has at least 3 members, and the Board of the General Assembly has at least one Chairman and one Vice-Chairman;
b) if cooperatives have no more than 20 members, the Management Organ and the Supervisory Organ can be composed by one single member – the President.

In the two-tier system, for all types of cooperatives – except agricultural credit cooperatives – the Supervisory Organ is an internal organ composed by cooperative members. Anyhow, the following must have **external auditors** – "Revisor Oficial de Contas":

- All agricultural credit cooperatives.
- Agricultural, Commercialization and Consumer cooperatives that, for 2 consecutive years, exceed two of these three indicators:
  a) Total of balance sheet - €: 1.500.000;
  b) Yearly turnover - €: 3.000.000;
  c) Number of employees during the financial year – 50.
- Housing cooperatives that, for 2 consecutive years, exceed two of these three indicators:
  a) Number of members – 500;

b) Total of equity - €: 1.000.000;
c) Total of balance sheet - €: 5.000.000.

In cooperatives, **each cooperator has one vote.** Stipulates **Article 51,** Par.1, of the Cooperative Code:

"*In the General Assemblies of cooperatives, each cooperator has one vote, irrespective of their participation."*

There all only two exceptions to this rule:

- Cooperatives whose members are exclusively other cooperatives;
- Cooperative unions, federations and confederations.

3.8. Registration and control

All cooperatives are subject to a registration in the Commercial Register Office/ Justice Ministry.

Main facts subject to registration:

a) creation, integrating the statutes;
b) modification of the statutes,
c) designation of the members of the Administration Organ;
d) merger and division of a cooperative;
e) liquidation of a cooperative.

Agricultural credit cooperatives are subject to a double control: external, by the Central Bank – Banco de Portugal, and internal, by the national Federation of Agricultural Credit Cooperatives – FENACAM.

Agricultural credit cooperatives integrated in the common system/SICAM are subject to a third control, by Caixa Central de Crédito Agrícola Mútuo.

The control made Commercial Register Office is a formal one.

The control incident in agricultural credit cooperatives comprehends the activity and the operations of these cooperatives. Including the possibility given to Caixa Central to nominate board members and to suspend or to convene the General Assembly.

3.9. Transformation and conversion

According to Portuguese law – **Article 80** of Cooperative Code – a cooperative cannot be transformed in a private company or in any kind of legal entity (association, foundation).

"*Is null the conversion of a cooperative in any type of commercial company, being also injured invalidity acts seeking to counteract or mislead this prohibition*."

The same for the conversion of private companies into cooperatives – is not possible.

3.10. Specific tax treatment

Portugal has a specific cooperative tax law – a law from the Parliament, from 1998.

When published, we can consider that the cooperative tax law devoted a positive discrimination in favour of cooperative enterprises.

Since 1998 till these days some taxes were reduced, the Government approved tax measures to SMEs, etc. But the cooperative tax law remained the same. And the positive discrimination is less and less "*positive*" and less and less "*discrimination*".

In **corporate tax - IRC**, are exempt of tax:

- Agricultural cooperatives;
- Cultural cooperatives;
- Consumer cooperatives;
- Housing cooperatives;
- Social solidarity cooperatives;
- Other cooperatives, in which: 75% of the employees are members, and 75% of the members play a productive role in the cooperative.

Other cooperatives, not exempt of IRC, pay a tax of **20%** (the regular tax is 25%).

The profits obtained in operations with non-members pay IRC, even in the exempt cooperatives. So, this compels cooperatives that work with non-members to have a separate accountancy for these operations.

The notion of profit, or surplus, for the cooperative tax law, is done by **Article 7**, Par. 1, of the cooperative tax law, Lei 85/98, from December 16th:

"*For the purpose of determination of the taxable result in IRC, the net operating surplus of cooperatives is discharged before the economic participation of members in the results, in accordance with the procedure laid down in article 3 of the Cooperative Code.*"

In what concerns **local taxes**, for real estate:

"***1.*** *Cooperatives are tax-free in Municipal Tax on expensive Buildings Transmissions (IMT) when they acquire any rights in immovable property intended for the registered office or to pursuit the activities that constitute their aim.*

2. *Cooperatives are also tax-free in Municipal Estate Tax (IMI), incident on the equity value of immovable property referred to in the preceding paragraph*." (**Article 10** of the cooperative tax law).

About **VAT**:

"*1.* *In agricultural cooperatives with processing sections, the VAT incident on deliveries made by their associated with products of their own holding only is chargeable on receipt of their price.*

2. *In the works of construction of buildings and provision of services inherent to construction, whose promoters are housing cooperatives, apply the reduced rate of VAT in point 2.16 list I annexed to the VAT code, provided that the buildings fall within the scope of social housing policy, namely, when complying with the concept and the parameters of*

housing costs monitored for this purpose, plus 20%." (**Article 15,** Par. 1 and 2**.,** of the cooperative tax law).

3.11. Existing draft proposing new legislation

Nothing to bring up.

3.12. Essential bibliography

- CORREIA, José Sérvulo – "**ELEMENTOS DE UM REGIME JURÍDICO DA COOPERAÇÃO**" ("ELEMENTS OF A LEGAL REGIME OF COOPERATION"), Ed. *Estudos Sociais e Corporativos*, Ano V, nº 17, 1966

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- NAMORADO, Rui **– "OS QUADROS JURÍDICOS DA ECONOMIA SOCIAL – UMA INTRODUÇÃO AO CASO PORTUGUÊS"** ("LEGAL FRAMEWORKS OF SOCIAL ECONOMY – AN INTRODUCTION TO THE PORTUGUESE SITUATION"), Ed*. Oficina do CES*, May 2006

- RODRIGUES, José António – "**CÓDIGO COOPERATIVO – ANOTADO E COMENTADO**" ("COOPERATIVE LAW COMMENTED"), Ed. *Quid Juris*, 2001

- SUBTIL, A. Raposo - "**LEGISLAÇÃO COOPERATIVA ANOTADA**" ("COOPERATIVE LAW COMMENTED"), Ed. *Vida Económica*, 2000

4. The SCE Regulation and national law on cooperatives

First point to emphasize:

If we compare the structure of the SCE Regulation and the structure of the Cooperative Code, there are no significant differences. Even the index of the subjects regulated is not very different.

So, as conclusion: the concerns of the European lawmakers and the concerns of the Portuguese lawmakers are similar.

I repeat: **the Portuguese Government has, till now, considered that it was not necessary to implement the Regulation**, implementation that could be made by the approval of a specific law, or with some modifications in the Cooperative Code.

Is it **strictly necessary** to implement the SCE Regulation, with a new law, or with a modification in the existing law? Not unavoidably.

Is it **convenient,** or **useful,** to implement the SCE Regulation, with a new law, or with a modification in the existing law? Yes. And for two main reasons:

First reason, because there are solutions in SCE Regulation that are more suitable to present times and to the present challenges that are set to cooperatives. I indicate three:

- the possibility of having investor members in cooperatives, attracting external financial resources to the cooperative sector;
- the possibility of a better motivation of the "best" cooperators, having other voting rights different of the exclusive rule "one man, one vote";
- the update and the revitalization of the cooperative government, allowing cooperatives to choose among the one-tier system and the two-tier system.

And nothing of this is new in the Portuguese cooperative sector: having investor members in cooperatives, and having the possibility of other voting rights different of the exclusive rule "one man, one vote", were ideas already existent when a non-approved proposal of a Cooperative Code was presented in the Portuguese Parliament in 1996. Giving Portuguese cooperatives the possibility of choosing among the one-tier system and the two-tier system is already in the law, but only for agricultural credit cooperatives.

Second reason, because if we introduce these new solutions in the Portuguese Cooperative Code, we create better legal conditions to the implementation of SCEs in Portugal, ensuring a desirable congruence and agreement between national and European regulations.

ROMANIA

By Simona Constantin

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Romanian legislation. – **1.1.** Source, time and modes of implementation. – **1.2.** Structure and main contents of the national regulation on SCE. – **1.3.** The designated Authority/ies as provided by art. 78, par. 2, SCE Reg. – **1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Romanian legislation. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Membership. – **3.5.** Financial profiles. – **3.6.** Organisational profiles. – **3.7.** Registration and control. – **3.8.** Transformation and conversion. – **3.9.** Specific tax treatment. – **3.10.** Existing draft proposing new legislation. – **3.11.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1. The implementation of SCE Regulation 1435/2003 in Romanian legislation

1.1. Source, time and modes of implementation

The SCE Regulation has been implemented in Romania by Government Emergency Ordinance no. 52 of 21 April 2008 amending and supplementing the Law no.31/1990 on trading companies and supplementing the Law no.26/1990 on the trade register. This ordinance makes directly applicable Regulation 1435/2003 and it has been approved by Law no.284 of 14 November 2008.[146] Thus, as stated in this ordinance, Law no. 31/1990 on trading companies, republished, as amended by this emergency ordinance, is the internal legal framework required for the direct application of Council Regulation (EC) no. 1.435/2003 of July 22, 2003 on the statute for a European Cooperative Society.

1.2. Structure and main contents of the national regulation on SCE

The Emergency Ordinance 52/2008, meant to amend and supplement Law 31/1990 and Law. 26/1990, contains only the following two references to the SCE:

1) Article IV (2) of the emergency ordinance provides the **definition** of the SCE, respectively: "The European Cooperative Society means, for the purpose of this emergency ordinance, the company whose registered capital is divided into shares, which has as its principal object the satisfaction of its members' needs and/or the development of their economic and social activities and which it is established under the conditions and

[146]Law no.284 of 14 November 2008 to approve Government Emergency Ordinance no.52/2008 that amended Law no.31/1990 on trading companies and for the modification of Law no.26/1990 on the trade register.

through the mechanisms provided by Council Regulation (EC) no. 1.435/2003 of July 22, 2003 on the statute for a European Cooperative Society."

2) Article II (2) provides for the insertion of a new article, Article 6^1, to Law no.26/1990 on the trade register[147] with the following content: "Article 6^1**.** - (1) the delegated judge to the Trade Register Office has the competence to verify the compliance with the pre-merger acts and formalities, when at the establishment by **merger** of a European Society or of a European Cooperative Society participates a trade company or a cooperative society - Romanian legal person - , as well as when is the case of a cross-border merger with the participation of a Romanian trade company or of a European Society based in Romania.

(2) The provisions of par. (1) shall apply accordingly in the case of **transferring the office** of a European Society or of a European Cooperative Society from Romania in another Member State."

It can be seen that this emergency ordinance only introduces the existence of SCE as a legal entity under Romanian law, without regulating its specific existence and activity. Since the SCE is defined as a company whose registered capital is divided into shares, the provisions of Law. 31/1990 on trading companies apply, this being the internal legal framework required for the direct application of Council Regulation (EC) no. 1.435/2003 of July 22, 2003 on the statute for a European Cooperative Society.

Other specific provisions related to the SCE can be found in the Ministerial Order no. 2594/C of 10 October 2008 on the approval of the Methodological norms regarding the keeping of the trade registers, the operation of the registrations and the issuing of information[148] and they regard registration formalities on registration, transfer of office, merger, deletion. Provisions on taxation can be found in the Fiscal Code (Law 571/2003), which has been last amended in 2010. The code provides that the SCE are legal entities considered to be subject to corporate income tax in Romania for the taxable income derived from any source, from Romania, as well as from abroad. The fiscal code provisions regarding corporate reorganizations involving companies from various MS have been amended to include specific provisions related to SEs and SCEs. Various provisions applicable to Romanian legal entities (such as taxation of dividend income, joint ventures) are also applicable to entities incorporated as per the European legislation.[149]

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The competent authority for the case provided for in article 7, 29 and 30 of the SCE Regulation is the Director of the Trade Register Office attached to the court and/or to the

[147] Law no. 26/1990 on the trade register, republished in the Official Gazette of Romania, Part I, no. 49 of February 4, 1998, with subsequent modifications.
[148] Issuer: Ministry of Justice, published in: the Official Gazette no. 704 of 16 October 2008.
[149] Provisions of art. 27^1 of the Fiscal Code.

person or persons designed by the Director General of the National Trade Register Office.[150]

1.4. Essential bibliography

Cristian Gheorghe, *Drept commercial European (European Trade Law*), C.H. Beck, Bucuresti, 2009.

Stefan Constantin, *Inmatricularea societatilor cooperative europene (The registration of the European Cooperative Societies)*, Tribuna Economica, No. 32, 2009, p. 15.

2. A comment on the implementation of the SCE Regulation in Romanian legislation

The overall visibility of the SCE in Romania is limited. A legal scholarship related to SCE does almost not exist. The few mentions of the SCE in articles or chapters in books rather enunciate the provisions of Regulation 1435/2003, without including an analysis of the subject. Strategic meetings or contacts have been convened and conducted with the management representatives of the main national cooperative associations[151] and with

[150] Law no. 84 of 13 May 2010 approving Government Emergency Ordinance no. 116/2009 provides in article 1 for the transfer of the competence to solve the requests for registration in the trade register and, as the case might be, the other requests which are in the competence of the delegated judge, from the delegated judge to the Director of the Trade Register attached to the court and/or to the person or persons designed by the Director General of the National Trade Register Office. But, this change is applicable only for a period of 4 months from the entry into force of Law 84/2010 (approving ordinance 116/2009), as within 4 months the Government shall adopt, at the proposal of the Ministry of Justice, the project of a law regarding the establishment, the organization and the functioning of the trade register profession. So, these changes are in force since this year, May, and they are due to be regulated again soon.
Article 6^1 of Law no.26/1990 on the trade register (introduced by ordinance 52/2008, which implemented the SCE Regulation in RO) provided that the competence as regards mergers or transfers in the case of SCEs belongs to the delegated judge:
(1) the delegated judge to the Trade Register Office has the competence to verify the compliance with the pre-merger acts and formalities, when at the establishment by merger of a European Society or of a European Cooperative Society participates a trade company or a cooperative society - Romanian legal person - as well as when is the case of a cross-border merger with the participation of a Romanian trade company or of a European Society based in Romania." The provisions of Law 26/1990 have been amended by the Emergency Ordinance 116/2009 of 12 January 2010 14 regarding the activity of registration of requests to the Trade Register, which transfers the competence from the delegated-judge to the Director of the Trade Register Office. See art. 5 of this Ordinance.
(2) The provisions of para. (1) shall apply accordingly in the case of transferring the office of a European Society or of a European Cooperative Society from Romania in another Member State."

[151] Meeting with Mr. Ioan Crisan, the President of the National Union of Consumer Cooperatives of Romania (CENTROCOOP) – open discussion and questionnaire based interview, Bucharest, January 2010; Meeting with Mr. Cristian Gabriel Mateescu, the Vice-President of the National Union of Handicraft Cooperatives of Romania (UCECOM) - open discussion and questionnaire based interview, Bucharest, January 2010;

relevant cooperative members[152] with the aim of gathering as much direct feedback and data as possible. Synthetic documents and information about the functioning and activity of national cooperative societies in Romania have been gathered as a result of contacts had with representatives of the Ministry of Economy, Trade and Business Environment.[153] No further specific measures have been taken by the relevant authorities in order to promote the SCE Regulation.[154]

The legislation on SCEs has been collected mainly by consulting EU and Romanian websites, online libraries, online legislative data bases, online journals, bookshops and university libraries ("ARTIFEX" University, Bucharest). In order to identify if there are any SCEs established in Romania, the National Trade Register has been consulted online and telephonically, which resulted in the negative.[155]

Overall, it can be said that the lack of dynamics as regards SCEs in Romania could be due to several factors: deficiencies regarding the visibility of the legal framework of SCEs within the cooperative sector, the civil society and the public sphere at large; although, a National Advisory Council of Cooperatives in Romania has been set up according to the provisions of Law 1/2005 on national cooperatives, the relationship between public bodies/administration and national cooperatives is remote and not targeted to the specificity of the national cooperatives' activity and needs/interests; the lack of specific measures/activities for the promotion of the SCEs; the specificity of the conditions for setting up SCEs (the minimum capital requirement which is high compared to the size of most of the cooperatives in Romania, difficulties in contacting and finding partners from other MSs in order to set up SCEs).

3. Overview of national cooperative law

3.1. Sources and legislation features

The cooperative societies are regulated in Romania by Law no. 1 of 21 February 2005 regarding the organization and operation of cooperatives. This is the general law on national cooperative societies, which has been adopted in 2005 after a long political

[152] Telephonic questionnaire based interviews have been conducted with the following persons: Mr. Alexandru Puzderca, the President of the Prahova County Union of Handicraft Cooperatives, Romania, January 2010; and Mr. Gavril Florescu, Manager of the cooperative society "Supercoop, Targu Neamt", Romania, January 2010.

[153] The main contact person has been Mr. Florin Rosu, Director responsible for the activity of cooperatives.

[154] The SCE Statute is published on the websites of the two main cooperative associations, the National Union of Consumer Cooperatives of Romania CENTROCOOP and the National Union of Handicraft Cooperatives of Romania UCECOM. UCECOM also has an online guide regarding the possibilities of association of the handicraft cooperatives in Romania, where the main conditions for taking part in an SCE are given, available at: http://www.ucecom.ro/romana/blsru/DocW/GHIDA.doc

[155] This information has been confirmed (telephonically) by the relevant representatives of the Trade Register Office of Romania.

process. It regulates the overall organization and operation of cooperatives, but it does not cover the credit cooperatives and central bodies of credit cooperatives, which are regulated by special banking laws. No special laws exist on the various types of cooperatives regulated by the general law[156], except for the agricultural cooperatives, which are regulated by Law no. 566/2004 on agricultural cooperative organizations published in the Official Gazette of Romania no. 1236/22 Dec. 2004. This law precedes the general law on cooperatives, which explains its detailed provisions and the redundancy with the content and structure of the general law. It nevertheless has the statute of special law and the general law applies only to matters not covered by it.

3.2. Definition and aim of cooperatives

Article 7 (1) defines the cooperative society as an autonomous association of natural and/or legal persons, as appropriate, set up on the basis of the free consent expressed by these ones, with the aim to promote the economic, social and cultural interests of cooperative members, being held jointly and democratically controlled by its members, in accordance with the cooperative principles. Para 2 of this article provides that the cooperative society is a private capital economic agent.

3.3. Activity

In view of achieving the purpose for which it was set up, the cooperative society may carry out any activity allowed by law. The activities carried out by the cooperative societies are subject to the authorization regime provided by the specific legislation in force. (Article 8)

There are no general provisions on the activity with non-members.

3.4. Membership

The minimum number of cooperative members of a cooperative society is established by statute, but should not be less than 5. (Article 12)

A cooperative member can be any natural person who has attained the age of 16 years, and any legal entity that comes under art. 6 para. E.[157] (Article 21, para.1) The Ordinary General Assembly is entitled to approve the inclusion of new members. (art. 40, para. h)

[156] According to Article 4 these are: handicraft, consumers, selling, agriculture, housing, fishery, transport, forestry and other forms which could be set up in accordance with this law.

[157] Art. 6, para. e provides that a legal person participating in the setting up of 2nd grade cooperative societies will be considered cooperative members within these companies.

3.5. Financial profiles

The **share capital** of the cooperative societies is variable and may not be less than **5,000,000 lei.**[158] (art. 9, para.1) It is divided into equal shares, whose nominal value is established by the constitutive act, which cannot be less than 100,000 lei.[159] (at. 9, para. 2) The cumulative participation of the cooperative societies grade 1 in the share capital of the cooperative societies grade 2 cannot be less than 67% (art.10).

The cooperative members receive shares in return for contributions subscribed. A cooperative member may hold **shares** within the limit and under the terms provided by the constitutive act, but will not exceed 20% of the share capital (art. 11).

The cooperative members are entitled to receive **dividends** from the annual profit, in proportion to ownership (art. 31, para. d).

The cooperative society may issue, under the law, cooperative nominal **bonds**, for an amount not exceeding 33% of the registered capital subscribed and paid, according to the latest annual financial statements approved by the General Assembly (art.62, par.1).

The cooperative society will take over at least 5 percent of the gross profits every year, in order to form the **legal reserve** until it amounts to a minimum of a fifth part of the registered capital. If the reserve fund, after its settling, is reduced for any reason whatsoever it shall be dully completed (art. 66). The constitutive act may establish ways of setting up and use of the statutory or contractual reserves, and of other reserves (art.67).

The managers are obliged, within 15 days from the date of approval by the General Assembly, to submit a copy of the **annual balance sheet** to the general direction of the county public finance body, respectively to the one of Bucharest, enclosing their report, the report of the auditors and minutes of the general assembly's meeting (art. 70, par.1). A copy of the annual balance sheet, signed by the general directions of the county public finance body, respectively of Bucharest, including the documents mentioned in the preceding paragraph shall be deposited with the Trade Registry Office (art. 70, par.2). Annual balance sheets are prepared in accordance with the legislation in force (art.71). The decisions made by the general assembly of the cooperative members, approving the annual balance sheet, must be submitted within 15 days to trade register in order to be mentioned in the trade register and published in the Official Gazette of Romania, Part VII (art.72).

The merger or the total division is accomplished by the **dissolution**, without liquidation, of the cooperative society, which ceases to exist, and by the universal transfer of its assets towards the beneficiary cooperative society or societies (in the state they find themselves at the time of the merger or of the division) in exchange for assigning shares to the cooperative members of the cooperative societies which ceases to exist (art.77,par.2).

[158] This represents 500 RON (New Romanian Lei)
[159] This represents 10 RON (New Romanian Lei)

The **dissolution** of the cooperative society has the effect of opening the liquidation procedure (art.84, par.1). The official receivers cannot pay to the cooperative members any sum of money for the parts they are entitled to by liquidation before all the company's creditors get paid (art. 87, par.1). The assets remaining after payment of amounts due to creditors of the Cooperative Society and of the divisible part to the cooperative members are transferred, by the decision of General Assembly members, to another cooperative society under the provisions of the constitutive act. If there is no decision made by the general assembly, the remaining assets shall be assigned by the competent court to a cooperative society of the same form, from the locality where the cooperative society has its registered office or from the nearest locality, by irrevocable court decision (art.87, par.2).

3.6. Organisational profiles

All the cooperative members form the **General Assembly** (art.34). In the cooperative society Grade 1 each cooperative member is entitled to one **vote**, irrespective of the number of shares he holds (art. 37). Within the cooperative societies of grade 2 each cooperative member is entitled to one vote, irrespective of the number of shares he holds, if in the constitutive act is not provided that each cooperative member is entitled to multiple limited votes, proportional to his participation in the share capital of the cooperative society (Art.38).

The administration and management of the cooperative society is ensured by the **sole manager** or by the **Managing Board**, composed of an odd number of members elected by secret ballot for a period of 4 years, appointed in the constitutive act, according to the complexity of the cooperative society and the number of cooperative members (art. 45). The cooperative society can be administered only by persons who are cooperative members (art.46 CL).

The **President** of the Cooperative Society is the de jure chairman of the managing board or the sole manager, as appropriate (art. 55, par.1). The president of the Cooperative Society is elected from among those cooperative members that have management skills and expertise in the respective field (art. 55, par.3).

The Management of Cooperative Society, with the approval of the general assembly of the cooperative members, may be entrust to an **executive director,** under a management contract which prescribes the performance criteria; the Executive Director may not be a cooperative member (art. 56, par. 1).

The general assembly of the cooperative members elects 3 **auditors** and an equal number of alternates, unless the constitutive act stipulates a larger number. In all cases, the number of the auditors must be an odd one (art. 57, par.1). If the cooperative society has up to 50 members, the general assembly elects only one auditor and one alternate

(art.57, par.2). **Censors** are elected by the General Assembly for a period of 3 financial years (art.57, par.3).

3.7. Registration and control

Any of the founding members, managers or persons authorized by them will, within 15 days from the signing of the constitutive act, request the registration of the cooperative society in the trade register in whose territorial area the cooperative society will have its office, in accordance with the legal provisions in force, in order to obtain the single registration certificate, drawn up by the delegated-judge (art. 14, par.4). After verifying the fulfilment of the conditions set by this law, the **delegated-judge** shall authorize, by way of conclusions, the registration of the cooperative society in the trade register and the publication in the Official Gazette of Romania, Part VII (art.14, par.8). The cooperative society becomes a legal entity as from the date of its **incorporation with the trade register** (art.14, par.9).

The supervisory authority is the Ministry of Economy, Trade and Business Environment, more specifically through its subordinated bodies because controls cannot be conducted by the representative cooperative organizations.

3.8. Transformation and conversion

The cooperative societies cannot be reorganized or transformed into trading companies set up under the provisions of Law no. 31/1990 on trading companies, republished, or into family associations under the provisions of laws regarding the authorization of natural persons and family associations which carry out independent economic activities (art. 19).

3.9. Specific tax treatment

Cooperative societies are not subject to special taxation. The standard rules for companies and enterprises apply. The cooperative societies are assimilated to SMEs according to art. 2 of Law no.346 of 14/07/2004 to stimulate the set up and development of the small and medium size enterprise.

3.10. Existing draft proposing new legislation

CENTROCOOP has initiated a proposal to adopt a special law on the activity of consumer cooperatives, and in this view, it has drafted a proposal which is under discussions within the National Advisory Council of Cooperatives and at the Ministry of Economy, Trade and Business Environment. A proposal for a law of handicraft cooperatives has been approved by the Senate of Romania on 14 March 2007 and the legislative process is ongoing.[160]

3.11. Essential bibliography[161]

Dan Cruceru, *Cooperatia in Romania (The Cooperative Society in Romania)*, Editura ARTIFEX, Bucuresti, 2007;

Cristian Gheorghe, *Drept commercial European (European Trade Law)*, C.H. Beck, Bucuresti, 2009;

The National Union of Consumer Cooperation CENTROCOO, *The Experience of Consumer Cooperation in Romania. Documentary Study*, Editura Universitara, Bucuresti, 2009; (available also in EN)

Ioan Crisan, *Dezvoltarea cooperatiei de consum CENTROCOOP (The Development of the CENTROCOOP Consumer Cooperative),* Tribuna Economica (The Economic Tribune), No. 47, 2009, p. 65;

UCECOM, *Viata cooperativei mestesugaresti (The Life of the Handicraft Cooperative Weekly Gazette issued), 2005--2009*;

Artifex Foundation, *Revista Cooperatia (The CooperativeJournal)*, No. 1 to 7, 1998-2006

4. The SCE Regulation and national law on cooperatives

Currently, the national cooperative sector has more visibility in Romania than the SCEs, although for both forms this visibility is still insufficient.

In terms of existence of a legislative framework, while national cooperatives are regulated by a detailed framework law, and by a special law in the case of agriculture and credit cooperatives, the SCE is not regulated within a coherent and detailed piece of

[160] It is Legislative Proposal PL-x nr. 150/2007. The legislative process is ongoing. See details at http://m.cdep.ro/pls/proiecte/upl_pck.proiect?idp=7333&cam=2 .

[161] The bibliography regarding the activity of the cooperative sector in Romania is rather outdated, as it refers most of the time to the dynamics during the communist regime. The relevant literature after the adoption of the framework law on cooperatives in 2005 is scarce and it lacks analysis, focusing rather on presenting the provisions of the law.

legislation. The existence of SCE is rather just introduced as a form of legal entity under Romanian law, but its specific features are left to be regulated by Regulation 1435/2003. The only specific amendments to the national laws have been performed as regards registration and taxation rules, as SCE has been included in the category of entities obliged to pay income tax according to the Fiscal Code. It can be observed that the implementation of the SCE regulation had no impact on the national legislation on cooperatives, as it triggered no amendments to this one.

Law 1/2005 created a unitary legal framework for the organization and functioning of the cooperative societies by promoting the cooperative principles internationally recognized, by setting the autonomy in making decisions and liberty of action, as well as the liberty to associate to county or national unions.

While the adoption of this law established the premises for the development and the revitalization of the cooperative sector, thus marking a significant improvement in regulating the cooperative sector, there are still many problems regarding the activity of the cooperative societies. Most of the problems relate to the following aspects:

- taxation rules and regulations: the imposition of a minimum income tax since 2009 has affected the activity of many small cooperatives, as the payments can amount, approximately, from 500 Euros (for incomes between 0 and 12.000 Euros) to 10.000 Euros per year. The tax regime is still under review and further changes might take shape in the context of the current situation of the country due to the economic crisis.
- property law uncertainties. Due to the heritage left by the specific regulation of the cooperative societies during the communist regime, currently, in many cases the cooperatives posses only the right to use the land on which they carry out their activities or on which they have constructions, not the full property. This triggers several problems, such as: difficulties in being granted construction authorizations or in accessing EU funding, as the funding schemes require the necessity to have the right of property for the land on which the constructions are situated; there are cases when the local administrative council sold to third parties the land under the constructions; lack of incentives to invest in the modernization of the constructions which would be necessary for carrying out their activities in accordance with EU standards; the decrease of the price of the constructions on the real estate market, due to uncertainties regarding the legal regime of the land under these constructions, etc.
- the National Union of Consumer Cooperatives, CENTROCOOP, asserts (in the memorandum attached to the proposal for a special law on consumer cooperatives) the need to change the provisions of the current law and to adopt a special law, in the sense of introducing the obligation for all the cooperative members to be bound by the norms and regulations of the national and county unions; and introducing the power of control of the cooperative members by the national union, in what regards the reorganization and setting up of the cooperative societies, and of the county unions, as well as in what regards the approving of the setting up, division, merger, liquidation and dissolution of the cooperative

societies; the cooperative societies thus highlight the need for the existence of special legislation, regulating the various forms of activity, which is reflected in the initiatives of proposing special laws on the consumer cooperatives and on handicraft cooperatives.

- although Law 1/2005 includes specific provisions for the role of the state in supporting the development of the cooperative societies, there is only a limited inclusion of aspects related to the cooperative sector at the level of the educational system.[162]

Overall, it can be concluded that the existence of SCEs in Romania has not accomplished so far the aims envisaged in the Statute Regulation. This stems from the fact that there is no SCE registered in Romania, but also from the lack of detailed transposition of the Regulation, by not making use of the options enshrined by the Regulation.

[162] The Arts and Crafts Cooperative's Primary and Secondary Educational System is represented by 12 Educational Centers, called “arts and crafts”. These educational centers are coordinated by the branches of “Spiru Haret” Arts and Crafts Cooperative's Primary and Secondary Educational System Foundation, legal person of private law, without any lucrative or patrimonial purpose, of cooperative interest, non-governmental and non-political. http://www.scoli-ucecom.ro/argument-en.php The “ARTIFEX” University – Academy of High Cooperative Studies is among the only higher education institution that offers courses (bachelor and masters) in the area of cooperative societies. It fuctions within the the Technico-Scientific and Socio-Cultural “ARTIFEX” Foundation of the Handicraft Cooperatives, along with The National Institute for Cooperative Studies and Research, the Centre for training the staff of the handicraft cooperatives, and the “Artifex” Publishing House.

SLOVAKIA

By Martin Katriak

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Slovak legislation. – **1.1.** Source, time and modes of implementation. – **1.2**. Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg.**.** –**1.4.** Essential bibliography. – **2.** Comment on the implementation of the SCE Regulation in Slovak legislation. –**3.** Survey on the national cooperative law. – **4.** The SCE Regulation and national law on cooperatives.

1. Implementation of the SCE Regulation 1435/2003 in Slovak legislation

1.1. Source, time and modes of implementation

Council Regulation No. 1435/2003 of 22 July 2003 on the Statute for the European Cooperative Society (SCE) was implemented into the legal order of the Slovak Republic by the Act No. 91/2007 Coll. of Laws on the European cooperative society.

In the Slovak legal order, there are no other legal sources related to the issue of the stated EC Regulation.

1.2. Structure and main contents of the regulation

Law No. 91/2007 Coll. of Laws on the European cooperative society that came into effect on the 1st January 2007 and through which the legal acts of the Community and of the European Union were transposed (Council Directive 2003/72/ EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees), came into effect on the 1st July 2007.

The Law is composed of fifty paragraphs arranged into four parts.

The first part contains general provisions that govern the formation of the European cooperative society, incompatibility of statutes with the agreement on the involvement of employees, protection of creditors, winding up of the European cooperative society due to the discrepancy in the address of registered head office and the headquarters, formation of the European cooperative society by a merger or by fusion, deletion from the Companies Register after the removal of the head office into the other member state, etc.

The second part of the Law governs composition, powers and operation of the bodies of the European cooperative society, for dualistic or monistic system.

The third part of the Law governs the involvement of employees in the European cooperative society, objective, the specific bodies related to them.

The fourth part of the Law contains common and final provisions, among others, the duty to keep secretiveness, confidential information, problems of the protection of employees representatives, etc.

In my view, the Law on the European cooperative society is relatively sufficient; it takes sections from the Regulation on the Statute for SCE. I consider these arrangements to be sufficient.

In my view, the request in the Article 78, paragraph 1 of the Regulation on the Statute for SCE is implemented into the Law on the European Cooperative Society in its individual provisions, eventually through the reference to the provisions in the Code of Commerce.

The legal system of the Slovak Republic does not contain any specific rules and/or functional territorial or other restrictions, duties or obstacles related to the SCE co-operative society, or relating to the free execution of some activities undertaken by the SCE and the standard which concerns the other legal forms of doing business (limited liability company, limited partnership, general commercial partnership, joint- stock company, co-operative society, etc.) according to the national rules.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

With regard to the obligation to designate the competent authority within the meaning of the Article 78 paragraph 2 of theRegulation on the Statute for SCE, this is incorporated in the provision of the § 29 of the Law on the European co-operative society that defines the issue of the special negotiating body and its scope of activities and competencies.

1.4 Essential bibliography

As far as I know, no basic bibliography exists in Slovakia connected with the issue of the Regulation on the SCE, eventually on the Slovak Law on the European cooperative society.

As a person who has been often contacted in the given matter, I benefit from the publication called “European Cooperative Society”, first edition published in 2004 by the Cooperative Association of the Czech Republic, the author: JUDr. František Helešic, CSc. The stated publication is an excellent reference point for the issue of the Regulation on the SCE and the fact that it was published in the neighbouring Czech Republic, given the similarity in many aspects of identity and of rules on the options for the legal form of undertaking, is irrelevant.

2. A comment on the implementation of the SCE Regulation in Slovak legislation

The author of the national report has been working in the Slovak cooperative system more than 35 years in many functions, either as a regular lawyer, or as the head of the legal department, or the trade manager. For the last 20 years, the author has held the position of Vice President of the COOP Jednota Slovensko that is the umbrella organisation of consumer cooperatives in Slovakia. In the framework of his position, the author is qualified in many various activities, including in the so called cooperative law (in Slovak legal system, the cooperative law is not the special legal branch).

The author was involved in the creation of the Code of Commerce, Part Cooperatives and has participated in the elaboration of other legal rules related to the cooperative theme, especially of non agricultural cooperative system (consumer cooperatives, producer cooperatives, housing cooperatives, etc.).

In the procedure of adoption of the Law on cooperatives, the author was the consultant of the Ministry of Justice of the Slovak Republic for the given topic, especially concerning the need for the specific arrangement of the relations and their transposing from the Regulation on the SCE into the Law on the European cooperative society.

Yet prior to the adoption of the Regulation on the SCE, the author, through the international cooperative bodies operating in Europe (EUROCOOP BRUSSELS, Cooperatives Europe based in Brussels) took part in the consultation process of the Draft Regulation on the Statute for SCE. It should be admitted that the remarks and comments of the author were not adopted. However, the abovementioned has not changed the fact that the author has sound knowledge as results from the abovementioned reasons.

Concerning the process of the implementation of the Regulation on the Statute for SCE in the Slovak Republic, one should state that the consultation process and its result has not evoked worthy attention. During the consultation process on the draft Law on the European Cooperative Society, several comments were raised. These, however, were not accepted by the Ministry of Justice of the Slovak Republic. With regard to the time – lapse, the author does not have the archives with comments submitted at disposal at this time. It is necessary to note that the consultation procedure was organised according to the legislation rules of the Slovak Republic, i.e. the usual organisations concerned with the consultation were contacted, then the Cooperative Union of the Slovak Republic, the draft Law was published on the website of the Ministry of Justice of the Slovak Republic and the suitable time for submitting comments was given. Following the consultation process of the Ministry of Justice of the Slovak Republic, results were evaluated and the draft Law on the European cooperative society was forwarded to the government. Then with no comments, the draft was sent to the National Council of the Slovak Republic. The National Council of the Slovak Republic has discussed the draft law within its own legal rules and subsequently approved it without comments. Then the Law was published in the Collection of Laws of the SR and became a part of the Slovak legal order.

In Slovakia, the possibility of doing business under the form of the European cooperative society is open - there are no restrictions, and no limitations. According to the author's experience, the possibility of undertaking in the form of the SCE is not used in Slovakia, the reason being that the relationships in cooperatives are complicated due to the fact that the position of the SCE employees is regulated by the special way in the structure of the European cooperative society. The entrepreneurs in Slovakia, as they said in the discussions with the author of this report, consider these internal relations in SCE as complicated and in their view, also as not acceptable. In order to maintain the unprejudiced view, it is necessary to add that in the territory of the Slovak Republic, the most frequent legal form of doing business, in addition to the self- employed people - the physical person with the trade licence, there is a legal form of the limited- liability company, or joint- stock company. Concerning the general commercial partnership, or limited partnership or cooperative society, there is no comparable interest for them as for the first mentioned. Finally the statistics on the number of commercial companies and cooperatives at the territory of the Slovak Republic show that only one SCE was formed, in Bratislava. I would like to note that it was impossible to contact the statutory bodies of the stated cooperative because it is not possible to connect them. From the general overview stated in the corresponding Register it is resulting that this sole cooperative society was established in 2009, the scope of business includes renting of premises, the bodies of the cooperative are based on the monistic system and the amount of the registered basic capital is 30 thousand Eur.

3. Survey on the national Cooperative Law

Slovak legal order does has have a specific cooperative law, the relations in the cooperative societies are governed by the Act No. 513/1991, Coll. Of Laws, Code de Commerce which has been in force since the 18th December 1991 and during its existence there were 32 amendments. The Code de Commerce in the Second Section, Chapter II, regulates the position of the cooperative society and the connected relations in the co-operative society. Chapter II, entitled Co-operative, is segmented into 5 sections and the regulation is stated from the provision § 221 until the § 260. The stated regulation of the Code de Commerce applies to all types of cooperative societies.

3.1 The Code de Commerce in § 221 defines the cooperative society as a community of open number of persons working together in order to perform business activity or to satisfy economic, social, or other needs of its members. The business name of the cooperative shall include the name "cooperative".

3.2 The cooperative may carry out all economic activities similarly as other commercial companies (limited- liability company, joint-stock company etc.), it can operate in a free way, without restraint. If its activity requires the special permission of the entrepreneurial

activity for which the special licence is needed (activity of a bank, insurance company, etc.), there is no difference neither from the qualitative, nor the quantitative side between the cooperative and the commercial company. The Slovak legal order does not contain either general, operative, or territorial or other restrictions, obligations or limitations connected with the nature of commercial activity for a cooperative society. It depends on the type of cooperative whether it undertakes with members, or with non-members. In this aspect it is a kind of freedom that is largely sed by different types of cooperative societies.

3.3 According to the 224 Code de Commerce, establishment of a cooperative society requires a constitutive member's meeting hearing. As defined by the Law, the constitutive meeting has to meet 3 required procedures, namely:

a) define recorded fixed assets,

b) approve Statutes,

c) elect Board of Directors and Control committee

A further condition for founding a cooperative society is the commitment of potential members at the constitutive member's meeting to repay member's fees approaching the defined sum of recorded fixed assets. The member's fee must be repaid in 15 days from constitutive member's meeting hearing. The fee is paid to a defined Board member and according to defined way approved by the member's meeting. The procedure for the constitutive member's meeting is verified by the notarized record, that incorporates a member's list with the amount of individual member's fees. Members are required to repay their fees as approved by the member's meeting. According to the § 225 Code de Commerce the cooperative society is found on the day of registration in the Register of business names. Prior the submission of the application, at least ½ of the amount of the recorded fixed assets must be repaid.

3.4 According to the § 221 Code de Commerce, the cooperative society must have at least 5 members/physical persons unless its members are at least two legal persons. Almost all cooperative societies Statutes define the procedure on new members acceptance. As a circumstance the Board of Directors decides on a new member admission, other decision-making competences are not excluded. As stated above, members of a cooperative society may be both physical persons and legal entities.

If Statutes determine membership with a labour relation toward a cooperative society, member may be a physical person, having completed primary school and achieving age of 15 years. Cooperative society keeps a list of all members. The Law defines essentials written down to individual lists. The Law defines also that each member has the right to look into a list and the cooperative society is required to provide members with the member's certificate and contents of a list on the member's application. According to the § 223 Code de Commerce the fixed assets are composed of the fund for the repayment of which are committed by members. The amount is determined by the ratio of capital to the capital of the cooperative society, where its Statutes provide otherwise. Statutes shall determine the amount of capital to be entered into Register of business names. Entered

the capital must be at least 1. 250 Eur. Amount of the member's fee, or different amount define Statutes. Each member is required to repay the outstanding member's fee, if unless the Statutes require a shorter period. The Law stipulates that the cooperative society is not allowed to pay contributions in kind to its members. Member's fee might be of financial or non financial nature. Member of the cooperative society may undertake to another fund to further equity in the business of the cooperative society as provided by the Statutes. The Law defines in the § 235 of the Code de Commerce that a cooperative society is required to establish an indivisible fund. This indivisible fund must not be less than ½ of recorded fixed assets of the cooperative society. Statutes may define that the higher indivisible fund will be established. The indivisible fund can be used exclusively for economical purposes defined by the Statutes, e.g. the coop loss covering. The indivisible fund may not be used for distribution among members during existence of the cooperative society.

The supreme cooperative body decides upon the distribution of the profit among members at the individual statement of finances. Member's share on the profit subject to distribution among members is stated by the share of individual member repaid member's fee towards all repaid member's fees. Statutes may define other ways of share computation.

In the case of expiration of the cooperative society membership, the member is entitled, in accordance with the § 223 Code de Commerce, for repayment of equity; unless the Statutes provide otherwise. The equity is stated by the share of payable member's fee of current member multiplied by number of completed years of his/her membership and summary of payable member's fees of all members multiplied by completed years of their membership. In the case of dissolution of the cooperative society on the winding-up way, the liquidation assets will be shared among members according to the Statutes. If Statutes provide otherwise, members will be repaid a share of their member's fee, the rest of liquidation assets will be shared among members, whose membership began at least one year prior to the date of dissolution. The above mentioned liquidation assets will be shared among these members according the range they share of the fixed assets. The Statutes may stipulate other way of the liquidation assets share as well.

According to the § 252 Code de Commerce, the cooperative society is required to prepare the financial statements as well as extraordinary individual accounts and for the profit or loss covering. These are subject to the supreme cooperative body approval. The cooperative society is required to deposit all financial statements and annual reports at the particular department of the Register of business names, where the cooperative society is registered (this is required basically from all legal entities).

3.5 Organisational structure of a cooperative society in Slovakia, exception is so called small cooperative society, is almost the same for all types of existing coops in Slovakia (consumer, producer's, housing, agricultural). The governing bodies are the Board of Directors and Control committee, and the supreme body is basically Member's meeting or General Assembly in the case that convocation of a Member's meeting is impossible due

to the number of members. This is in accordance with the Code de Commerce and Statutes of individual coops. In accordance with the para 240 of the Code de Commerce in the case of Member's meeting it is effective "one member, one vote" at the Member's meeting, but Statutes provide other options as well. The Board of Directors and Control committee members are entitled to one vote only at a body's meeting where they are members.

The term of the coop society bodies' members is stipulated by the Statutes but it may not exceed 5 years period. Members of the first bodies after cooperative society founding may be elected for a 3-year term maximally. The cooperative society bodies' members may be re-elected. Position of Board of Directors members and Control committee members are incompatible according to the para 247 of the Code de Commerce. Neither Law nor the Statutes stipulate if non-members are allowed to be managers or leader employees. The practice is that the coop society director, if this position is defined, or leading managers, are members of the coop society, occasionally they are not members of a governing or executive body.

As results from the Law, each coop society is obliged to appoint a control committee. Exception is a small society (according to the §245 of the Code de Commerce, a small coop society is the one that has less than 50 members. The Statutes may define that powers of a Board of Directors and Control committee are delegated to a Member's meeting in this case). Statutes of a cooperative society based on the legal entities membership having fewer than 5 members stipulate the decision-making process as well as the governing body.

In accordance with the general legal documents, each coop society has to have an (external) auditor and he/she is approved by the body stipulated by the Statutes. As a circumstance it's usually the supreme coop society body. Interesting fact is that the external auditor is not allowed to act in the coop society longer than 3 years.

Except in a producer's coop society, where the coop employees do not take positions stated specially by the Statutes. Their rights and interests represent the trade unions organisation if established in a cooperative society.

3.6 A cooperative society must be registered in the Register of business names kept at the relevant court. All commercial companies as well as cooperative societies must be registered in the Register of business names, with their provision of their founding and legal identity. The register of business names records so called specialised departments for a particular legal entity of a commercial company or cooperative society. The register of business names checks if applications are in accordance with the Law and form that requires the Law. This procedure is administrated prior to registration. There are no formal differences between particular types of commercial companies and cooperative societies as to registration into Register of business names concerns or changes connected with the Register. The court provides application forms for the purpose of registration. These application forms are unified for all Registers of business names in Slovakia (8 Registers

of business names in Slovakia) applicable for all Slovakia territory. Essentially, each registration into the Register of business names is liable to tax. The deadline for the Register of business names is stated for 5 working days; this period is usually respected.

In the case of some insufficiency of an application, the Register of business names (the court) will provide the claimer with a notice to the claimer in order to eliminate the missing data. The author of this document states the procedure of the Register of business names has improved significantly since last 10 years.

Cooperatives are subject to public control only in cases specified by the Law. The tax examinations are an example. Representation cooperative organisations have no control rights coming form the Law but members are entitled to agree that this kind of body has the right to provide some control activity; however, conditions must be strictly specified.

3.7 According to the § 69 b) of the Code de Commerce a cooperative society is entitled to change its legal status. The change of legal status does not mean a dissolution of the cooperative society as the legal entity. The provision of § 69 b) specifies that a decision on the legal status change requires agreement of all stakeholders (members) if the Law, partnership agreement or statutes do not stipulate otherwise.

According to the § 239 of the Code de Commerce on the cooperative society, legal status change is decided by the general assembly as the highest body. As far as a vote on the legal status change is concerned, the Code de Commerce does not define any special modification. Once the resolution of the general assembly on the legal status change has to be applicable, the presence of the qualified majority of members and agreement of the majority of presented votes is required.

The author notes that almost all cooperative societies' statutes, regarding the decision making process on merger, integration, splitting or dissolution of the cooperative society, require a so called qualified majority, usually defined as 2/3 of all supreme cooperative body votes. As comes from the author's long years taking practice in the cooperative system there are only two cases of change of the legal status of a cooperative society to other legal status.

3.8 The cooperative society, as far as the tax regime is concerned, is a subject of standard applicable for all enterprises. It has no special tax regimes at the Slovak Republic territory.

3.9 As I have already mentioned above, the cooperative society matters are regulated by the Code de Commerce. The discussion on the necessity of the special Law on cooperatives was under way within the Slovak cooperative movement in 1995 – 1997. The concerned cooperative bodies and institutions submitted particular opinions in this area. We realized ourselves the risk of continuing in this activity when discussing these opinions at the level of external institutions (ministries, national Parliament, etc). At that time, the composition of the Parliament did not provide (author's note - the same situation is currently present as well) any guarantee for approval of submitted Law proposal with reasonable legislation-procedural modifications. The real risk has ever persisted that some

interested influencing groups should use this Law proposal for their own benefits and that is not in accordance with needs and positions, history and tasks of cooperatives. In this connection I'd like to mention the situation from 1991 when the real intentions were to dissolve cooperative societies since they were considered the posthumous of socialism. After that, if there were some interest, cooperatives should be founded by real co-operators (!?). If I remember this well we succeeded by 3 – 4 votes difference at that time at Federal Assembly of the Czechoslovak Federal Republic. This means that no activity, either internal nor external has existed within the cooperative system since 1995 – 1996 that should be aimed at enforcing a special Law on cooperatives.

4 The SCE Regulation and national law on cooperatives

As results from the abovementioned, the differences, when comparing to the European Cooperative Society appear in many cases, e.g. definition of a cooperative society in the Law on European Cooperative Society and a cooperative society defined by the Code de Commerce. I underline the fact these are two different legal regulations. Even though they both concern a cooperative society, each has differences easily identifiable if comparing both legal regulations.

These differences do not consist in establishment and registration of a particular cooperative society. This procedure is almost the same for both. Differences consist mainly in the bodies' constitution. As far as the European Cooperatives Society bodies is concerned, they have some competences that are not incorporated within the competences of a national cooperative society. For example, according to the § 17 Direction on the SCE, the Control committee is entitled to stipulate that its approval is required for those Board of Directors decisions as well, even though this approval is not required by the Statutes. According to § 16 Direction of SCE, partial parallel of Board of Directors and Control Committee membership is allowed; nevertheless, for a limited period only. According to the Direction on SCE, an Administrative Council may be constituted in the case of monistic system, but this is impossible according to the Code de Commerce. Position of the Director General, as defined by the § 22 Direction on SCE, is not incorporated in the Code de Commerce. The Author recognises a special problem in excessive attention of the Direction on SCE to the employees participation in SCE, see § 27 and thereinafter. The Author has expressed his disagreement with this kind of definition within the making up process on the Council opinion to issue the Council's direction on the SCE Statutes. A difficulty concerning an indivisible fund persists in the quoted European Cooperative Society Statutes as well as in the Regulation on SCE. This issue was remarked by the author within the making up process but without any response.

The author underlines that implementation of the Regulation of SCE hasn't impacted national legislation on cooperatives either in a negative nor positive way. The Regulation

of SCE was approved by the Slovak National Parliament in 2007 and it has taken over all fundamental institutes from the Council Regulation 1435/2003 from July 22,2003 on the SCE Statutes.

The Slovak register has no legal limit for cooperative society development in the Slovakia territory. The first cooperative society in Slovakia was founded in 1849 and the cooperative movement has continued up to now in spite of its negative but mostly positive aspects. It is necessary to point out without prejudice, that the cooperative form of entrepreneurship is not a legal form extra favourable. Entrepreneurs prefer a joint stock company or a Limited liability company form of business.

SLOVENIA

By Matija Damjan

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Slovenian legislation. – **1.1.** Source, time and modes of implementation. – **1.2**. Structure and main contents of the regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg**.** –**1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Slovenian legislation. –**3.** Overview of Slovenian cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives.

1.The implementation of SCE Regulation 1435/2003 in Slovenian legislation

1.1. Source, time and modes of implementation

The SCE Regulation was implemented in Slovenian legal system in 2009 through amendments to the **Cooperatives Act** of 1992 (***Zakon o zadrugah*** – ***ZZad***),[163] which contains the general rules on cooperative societies. A new Chapter IX.A titled *EVROPSKA ZADRUGA (SCE)* was inserted in the said act by the **Act Amending the Cooperatives Act** (***Zakon o spremembah in dopolnitvah Zakona o zadrugah – ZZad-C***),[164] which was adopted by the National Assembly on 22 October 2009 and entered into force on 17 November 2009. Almost all of the national rules concerning European cooperative societies are contained in the new Chapter IX.A.

The **Court Register Act** of 1994, last amended in 2009, (***Zakon o sodnem registru – ZSReg***)[165] also contains a reference to the SCE in the list of entities subject to registration under this Act.

Directive 2003/72/EC on employee participation has been transposed into Slovenian law by a special act: **Act on Workers Participation in Management of European Cooperative Society** of 2006 (***Zakon o sodelovanju delavcev pri upravljanju evropske zadruge – ZSDUEZ***).[166]

[163] Official Gazette of the Republic of Slovenia, No. 13/92, 7/93, 13/93-ZP-G, 22/94, 68/95 Odl.US: U-I-78/93, 35/96, 41/07, 62/07-UPB1, 87/09.
[164] Official Gazette of the Republic of Slovenia, No. 87/2009.
[165] Official Gazette of the Republic of Slovenia, No. 13/94, 91/05, 111/05 Odl.US: U-I-212-03-14, 114/05-UPB1, 42/06-ZGD-1 (60/06 popr.), 33/07, 54/07-UPB2, 65/08, 49/09.
[166] Official Gazette of the Republic of Slovenia, No. 79/06.

There are no special laws regulating the activities of particular types of cooperatives or cooperatives in a specific economic sector.

1.2. Structure and main contents of the regulation

The implementation of the SCE Regulation 1435/2003 is quite voluminous and relatively detailed in comparison with the Act's general provisions on cooperatives. Whereas the Cooperatives Act originally consisted of 83 articles, the new Chapter IX.A contains 34 additional articles on SCE. The chapter is divided in five parts:

1. General provisions
2. Transfer of registered office of the SCE
3. Formation by merger
4. Conversion of a cooperative into an SCE and of an SCE into a cooperative
5. Structure of the SCE

The **General provisions** (Articles 56.a to 56.d of Cooperatives Act) contain the definition of terms, the provisions on SCE's entry in the register of companies, on the publication of certain particulars in the Official Journal of the European Union and in the Official Gazette of the Republic of Slovenia and on the determination of the address of the SCE's registered office. For issues of SCEs not specifically regulated in Chapter IX.A, the Act refers to the use of general rules on cooperatives contained in other chapters of the Cooperatives Act. For certain issues concerning the formation of new SCEs, the rules governing the formation of public limited-liability companies apply by analogy.

Articles 56.e to 56.j of the Cooperatives Act regulate the **transfer of SCE's registered office**. The following acts and procedures are specified:

- the duties of the management, of the supervisory board and of an independent auditor to examine the intended transfer and produce a report on it;
- the submission of the transfer draft to the registration authority, its publication and its presentation at the SCE's general meeting;
- the right of the SCE's creditors to request collateralisation of debts;
- the procedure for the entry of the transfer in the register, including the registration authority's scrutiny of the transfer;
- the procedure for the entry in the register of the transfer of SCE's registered office from another Member State to the Republic of Slovenia.

A specific feature of Slovenian law is provisions of Article 74 of the Cooperatives Act barring the distribution of certain types of assets of a cooperative among its members even upon winding-up of the cooperative. This only applies to assets that have not been contributed by members, but were obtained by the cooperative either as social property before 1992 (a special type of property in the former Yugoslav socialist legal system) or through the participation of a cooperative in the process of privatisation of former socially-owned companies. The law also prevents the transfer of such assets out of Slovenia.

Therefore, Article 56.h of the Cooperatives Act provides that an SCE may only transfer its registered office to another Member State if such assets are transferred beforehand to a cooperative association with its registered office in Slovenia. In such a case, the Ministry of Agriculture may oppose the transfer on grounds of public interest within the two-month period after the publication of the application for transfer.

Formation by merger is regulated in Articles 56.k to 56.r of the Cooperatives Act. The following acts and procedures are specified:

- the submission of draft terms of merger to the registration authority and the publication of the particulars from Article 24(2) of Regulation 1435/2003/EC (the rules on mergers of public limited-liability companies apply by analogy);
- the examination of draft terms of merger by independent auditors;
- the right of a cooperative's creditors to request collateralisation;
- the right of the members of the merging cooperatives to tender their resignation before the merger, in which case the resolution giving consent to the merger does not apply to the resigning members;
- the reasons that do not give grounds to challenge the validity of the general meeting's resolution giving consent to the merger;
- the right of the members of a cooperative being acquired, with its registered office in another Member State, to file an application for a judicial review of the share-exchange ratio;
- the procedure of entry of the intended merger in the register of companies, including the registration authority's scrutiny of the merger.

Again, in case a cooperative owns assets which may not be distributed among its members even upon winding-up, it may participate in the formation of an SCE with its registered office in another Member State only if any such assets are transferred beforehand to a cooperative association in Slovenia. The Ministry of Agriculture may oppose, on grounds of public interest, the participation of a cooperative established in accordance with the law of the Republic of Slovenia in the formation of an SCE by merger (Article 56.p of Cooperatives Act).

The conversion of a cooperative into an SCE is regulated in Articles 56.s to 56.s of the Cooperatives Act. The following acts and procedures are specified:

- the basic contents of the draft terms of conversion;
- the examination of the conversion draft by an auditor and the auditor's report, which are both governed by analogy with the rules on formation audit;
- the submission of the conversion draft to the registration authority, its publication and its presentation at the SCE's general meeting;
- the procedure for the entry of the transfer in the register, including the registration authority's scrutiny of the transfer;
- the procedure for the entry of the conversion in the register of companies.

The conversion of an SCE into a cooperative is regulated by analogy with the rules governing the conversion of a cooperative into an SCE (Article 56.v of the Cooperatives Act).

The final division of Chapter IX.A of the Cooperatives Act contains rules on the **Structure of the SCE**. The one-tier system is regulated in more detail since it is permissible only for SCEs, while other cooperatives must be organised in accordance with the two-tier system.

In the **two-tier system**, both the management organ and the supervisory organ must consist of at least three members, who are all appointed and removed by the general meeting (unless the SCE has fewer than 10 members, in which case there may be a single-member management organ – the president of the SCE). An SCE may have one or more executive directors, appointed and removed by the management organ. An SCE whose securities are traded on a regulated securities market must also have a supervisory organ and an audit committee. Under the general rules of cooperatives, a cooperative's statutes may determine that certain types of transactions are subject to authorisation by the supervisory board. If the supervisory organ refuses to give authorisation, the management organ may request that the general meeting makes the final decision on the authorisation of the transaction.

In the **one-tier system**, the administrative organ must consist of at least three members, who are appointed and may be removed before the expiry of their term by the general meeting. An audit committee must be formed by the administrative organ of an SCE, the shares of which are being traded on a regulated securities market or in which the employees exercise their right to involvement in the affairs of the SCE. At least one member of the audit committee must be an independent expert in the fields of accounting or finance. Executive directors of the SCE who are members of the administrative organ may not become members of the audit committee.

The members of the administrative organ represent the SCE jointly unless the SCE's statutes provide otherwise. In the case of joint representation, a declaration of will made by a third party to any member of the administrative organ has effect against the SCE as a whole. The SCE's statutes may confer the power to represent the SCE on each individual member of the administrative organ, or on at least two members acting jointly, or on a member acting jointly with a procurator of the SCE. The administrative organ must draw up an annual report and prepare a proposal for the allocation of available surplus and present both to the general meeting.

One or more executive directors are appointed by the administrative organ. A member of the administrative board may be appointed executive director as long as executive directors do not form a majority of members of the administrative organ. The president of the administrative organ of an SCE that, according to the criteria for the classification of companies by size, is not a medium-sized or a large SCE may not simultaneously perform

the function of an executive director. The administrative organ may at any time remove an executive director.

The administrative organ may transfer the following tasks to executive directors:

- the conduct of current business;
- filing applications for entries in the register and submission of documents;
- responsibility for bookkeeping; and
- drawing up of the annual report (in case it must be audited, the audit report and the proposal for the allocation of available surplus at the general meeting must be annexed to the annual report and immediately submitted to the administrative organ).

In performing their duties, the executive directors must follow the instructions and limitations set by the general meeting, the administrative organ, the SCE's statutes and any rules of procedure of executive directors. Where several executive directors are appointed, they must conduct the business jointly, unless the SCE's statutes or the rules of procedure of the administrative organ provide otherwise, or the directors themselves adopt their own rules of procedure.

Concerning the **general meeting** (both in the one-tier and two-tier system), the SCE's statutes may provide:

- that an individual member has a higher number of votes, determined by his/her participation in the SCE's activity other than by way of capital contribution. This attribution may not exceed five votes per member or 30% of total voting rights, whichever is the lower in each individual case;
- that an individual member of an SCE involved in financial or insurance activities has a higher number of votes, determined by the members' participation in the SCE's activity including participation in the capital of the SCE. This attribution may not exceed five votes per member or 20% of total voting rights, whichever is the lower in each individual case;
- that an individual member of an SCE, the majority of members of which are cooperatives, has a higher number of votes at the general meeting, determined in accordance with the members' participation in the SCE's activity including participation in the capital of the SCE or by the number of members of each comprising entity.

The SCE's statutes may allocate voting rights to investor members. Investor members' voting rights taken together may not amount to more than 25% of total voting rights.

Where the SCE undertakes different activities or activities in more than one territorial unit, or has several establishments or more than 500 members, its statutes may provide that the members shall elect their delegates to the general meeting at sectoral or section meetings.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

The competent authority within the meaning of Articles 7(7), 7(8), 29, 30 and 73 of Regulation 1435/2003 is the District Court that holds the territorial jurisdiction over the place of the SCE's registered office. District courts also keep the register of companies in which the SCE must be entered.

The competent authority within the meaning of Articles 7(14) and 21(1) of SCE Regulation 1435/2003 is the ministry responsible for agriculture (i.e. the Ministry of Agriculture, Forestry and Food).

The competence of a state authority to convene an SCE's general meeting (Art. 54 of SCE Regulation 1435/2003) is not provided in the Cooperatives Act.

1.4. Essential bibliography

The following essential bibliography deals with the implementation of the SCE Regulation 1435/2003 in Slovenian law:

- Franci AVSEC, Societas Cooperativa Europea (SCE) - Evropska zadruga, Podjetje in delo, #1/2004, p. 72.
- Jorg SLADIČ, Evropska zadruga in Evropsko gospodarsko interesno združenje : zakaj pravne osebe na ravni prava Skupnosti? (S*CE and EIIG: The Reason for Legal Entities at the Community Level*), Podjetje in delo, #6-7/2004, p. 992.
- Andrea GRAJNER, Novi organizacijski modeli kmetijskih zadrug v Sloveniji in Evropski uniji: magistrsko delo (*New Organizational Models of Agricultural Cooperatives in Slovenia and European Union: M. Sc. Thesis*). Maribor: [A. Grajner], 2008.
- Franci AVSEC, Primož ŽERJAV, Tretja novela Zakona o zadrugah za večjo privlačnost te organizacijske oblike (*The Third Amendments to the Cooperatives Act to Improve the Attractiveness of the Organizational Form*), Pravna praksa #44/2009, p. 10.
- Franci AVSEC, Predpisi o Evropski zadrugi v državah pogodbenicah evropskega gospodarskega prostora (*SCE Rules in EEA Member States*), Podjetje in delo, #3-4/2009, p. 746.
- Peter PODGORELEC, Evropska zasebna družba (*European Private Company*), Pravna Praksa #5/2009, p. 8.
- Paolo BRUNI, Nove poti zadružništva: gradivo posveta (*New Paths for Cooperatives: Symposium Materials*), Zadružna zveza Slovenije, Ljubljana 2010.
- Franci AVSEC, Primož ŽERJAV, Zakon o zadrugah z uvodnimi pojasnili (*Cooperatives Act with Introductory Remarks*) GV založba, Ljubljana 2010.

2. A comment on the implementation of the SCE Regulation in Slovenian legislation

After reviewing Chapter IX.A of the Cooperatives Act and a comparison of its provisions with the provisions of Regulation 1435/2003/EC, no specific problems or irregularities have been identified concerning the implementation of said Directive in Slovenian law. From this (purely normative) aspect it can be said that the legislature has taken the SCE Regulation seriously and has provided all rules necessary for SCE's establishment and unhindered operation. The legislature has exercised several of the options provided in the Regulation, for example:

- the lowest number of members of the administrative organ and the supervisory organ has been set;
- members of the administrative organ must be elected directly by the general meeting;
- the Ministry of Agriculture may oppose, on grounds of public interest, the transfer of registered office or the merger of cooperatives in certain cases;
- as a form of protection for members who have opposed the merger of cooperatives, such members may resign from the cooperative so that the consent to the merger already given does not apply to them;
- the SCE's statutes may confer the power to represent the SCE on each individual member of the administrative organ, or on at least two members acting jointly, or on a member acting jointly with a procurator of the SCE.

Through the provisions of the Cooperatives Act, the SCE is in no way disadvantaged in comparison with the classical form of cooperative. However, no special measures for the promotion of SCEs seem to have been provided.

There has not yet been much debate from legal scholars or practitioners on the regulation of SCEs in Slovenia. Most of the bibliography mentioned limits itself to the presentation and discussion of the SCE as a new cooperative legal form and its features. The main reason for the lack of discussion seems to be the fact that the SCE Regulation 1435/2003/EC was implemented relatively recently (November 2009), and has not yet been used in practice.

Based on the information obtained from Slovenian Business Register managed by the Agency of the Republic of Slovenia for Public Legal Records and Related Services (available online at http://www.ajpes.si/), **no SCEs have yet been registered in Slovenia** (as of 8 April 2010). Also no national cooperative has been identified which is member of an SCE registered in another EU member state.

Answers to the second SCE questionnaire have been gathered through interviews by e-mail with representatives of 12 Slovenian cooperative societies. The main finding is that the general level of awareness of the SCE regulation in Slovenia is rather low. Most interviewees have heard of this form of SCE before, but have no detailed knowledge of the

features of such a form of enterprise. Due to the late implementation of the SCE Directive, most cooperatives' members have not yet had the chance to get informed about the new rules, since general meetings of cooperatives have not yet been held in the meantime. There appears to be little interest for such a form of organisation, as most cooperatives are not engaged in cross-border activities. Nevertheless, a representative of one cooperative has mentioned that the transformation into an SCE had been considered mostly due to the possibility of providing services in neighbouring Member States. Some cooperatives' representatives have felt that there is no special need for a European form of cooperative.

3. Overview of Slovenian cooperative law

3.1. Sources and legislation features

The general law on cooperatives is contained in the **Cooperatives Act** of 1992, last modified in 2009 (*Zakon o zadrugah – ZZad*).

There are no special laws regulating the activities of particular types of cooperatives or cooperatives in a specific economic sector. The legislation governing the financial sector requires the use of a form of a company with share capital (as regulated in the Companies Act) for certain regulated activities, which prevents the direct use of cooperative form of company.

3.2. Definition and aim of cooperatives

A cooperative is defined in Article 1 of the Cooperatives Act as an organisation, the number of whose members is not defined in advance, whose aim is to promote the economic interests and develop the economic and social activities of its members and is based on voluntary membership, free resignation, equal participation and management by the members. A cooperative may conduct its activities through a subsidiary. A cooperative may also establish a company, another cooperative or another legal entity, or itself become a member of another legal entity, if this serves the purpose with which the cooperative has been established.

This provision has been influenced by the Regulation 1435/2003/EC, namely the definition of the aim of a cooperative was expanded to include the development of the economic and social activities of its members. The possibility of conducting activities through a subsidiary was also added through the last amendments to the Cooperatives Act.

3.3. Activity

Article 2(1) of the Cooperatives Act provides that a cooperative may perform one or more activities if it fulfils any specific conditions prescribed and as long as this serves the aim for which the cooperative was established.

In principle, a cooperative may perform any activity under the same conditions as any other form of enterprise. There are no special laws regulating the activities of particular types of cooperatives or cooperatives in a specific economic sector. Article 56(2) of the Cooperatives Act explicitly states that a cooperative may perform any activity under the same conditions as companies.

Sectoral legislation may require, however, that certain types of activities may only be performed in the organisational form of a company with share capital (as regulated in the Companies Act), which is mostly due to stricter requirements concerning the minimum capital, the accounting and auditing of such companies. This limitation is typical of financial institutions; e.g., the Banking Act[167] requires that banks are organised in the form of a public limited-liability company or a European public limited-liability company. In accordance with the Insurance Act[168], insurance companies may be organised in the form of a public limited-liability company, a European public limited-liability company or a mutual insurance company. Financial Instruments Market Act[169] requires that stock exchange is organised as a public limited-liability company and the brokerage companies are organised as public limited-liability companies, European public limited-liability companies or limited liability companies. In these sectors, therefore, the use of the cooperative form of enterprise is not possible.

In accordance with Article 2(2) of the Cooperatives Act, a cooperative's statutes may allow the cooperative to deal with non-members, as long as it only conducts with them the same types of transactions it conducts with its members and not in such a way and to such an extent as to render secondary the cooperative's dealing with its members. A contract or another legal transaction concluded in breach of this rule remains valid nevertheless.

3.4. Forms and modes of setting up

A cooperative may be set up by at least three founding members, who are either natural persons with full legal capacity or legal entities. A cooperative is established by the adoption of an instrument of incorporation, which must contain:

[167] Zakon o bančništvu (ZBan-1) (Uradni list RS, št. 131/06, 1/08, 109/08, 19/09, 98/09).
[168] Zakon o zavarovalništvu (ZZavar) (Uradni list RS, št. 13/00 (91/00 popr.), 12/01 Skl.US: U-I-131/00-11, 21/02, 52/02-ZJA, 91/02, 29/03 Odl.US: U-I-131/00-22, 50/04, 65/04 Skl.US: U-I-300/02-31, 102/04-UPB1, 79/06, 109/06-UPB2, 9/07, 102/07, 69/08, 19/09, 49/09).
[169] Zakon o trgu finančnih instrumentov (ZTFI) (Uradni list RS, št. 67/07 (100/07 popr.), 69/08, 40/09, 17/10 Odl.US: U-I-196/09-15, Up-947/09-9 (21/10 popr.)).

- the names and addresses of the founding members;
- a resolution on the adoption of the cooperative's statutes;
- a resolution on the election of the organs of the cooperative that must be elected in accordance with the law and with the cooperative's statutes;
- the date and place of the first general meeting;
- the signatures of all founding members.

The cooperative's statutes must be annexed to the instrument of incorporation and are considered a part thereof (Articles 4 and 5 of the Cooperatives Act).

3.5. Membership

A cooperative must retain the minimum number of three members throughout its operation. If the number of members is reduced below three and remains such in a continuous period of six months or more, the cooperative must be wound up (Article 47 of the Cooperatives Act).

After the cooperative has been set up, new members may join by signing the declaration of membership stating that the signatory agrees with the rights, obligations and responsibilities laid down in the cooperative's statutes. The declaration of membership must contain the amount and number of shares that the signatory is willing to accept and a statement that he/she is aware of the provisions of the cooperative's statutes concerning the responsibility of members for the cooperative's liabilities.

The cooperative's statutes may provide that persons who do not intend to use or provide the cooperative's goods and services may also be admitted as investor members. The general meeting must approve the admission of every new investor member. It may also authorise another organ of the cooperative for the approval of the admission of new investor members (Articles 8 and 8.a of the Cooperatives Act). The rules on investor members are a novelty in Slovenian law, introduced by the latest amendments to the Cooperatives Act, following the example of the Regulation 1435/2003/EC.

By the default rule, each member of a cooperative has one vote at the general meeting. However, the cooperative's statutes may provide a different distribution of voting rights, so that certain members have a higher number of votes (Article 18 of the Cooperatives Act). There are no conditions or limitations to this exception to the principle of equal voting rights. If the statutes provide that investor members may be admitted to membership, these members may not have more than 25% of the votes of members present or represented at the general meeting. The statutes may set a lower threshold of investor members' votes or may provide that investor members do not have voting rights at all (Article 23(4) of the Cooperatives Act). Special provisions are in place for investor members of SCEs (Article 56.af of the Cooperatives Act), mirroring the provisions of Article 59(2) of Regulation 1435/2003/EC.

3.6. Financial profiles

There is no minimum capital requirement for the establishment of a cooperative and the capital is variable in principle. The cooperative's statutes may, however, set the minimum amount of capital below which the cooperative's capital may not be reduced by repaying the member's shares (Article 39.a of the Cooperatives Act). In this way the variability of the capital may be limited by the statutes (this rule was introduced under the influence of Regulation 1435/2003/EC).

Each member must hold at least one share. The nominal value of all shares is identical unless the cooperative's statutes provide that individual members must subscribe the mandatory share of a different value or a different quantity of mandatory shares, depending on the mode of their participation in the cooperative, the size or other specifics of the members' economic units (e.g. agricultural holdings, plants or households). Apart from the mandatory share, each member may subscribe one or more voluntary shares in accordance with the conditions set out in the cooperative's statutes. The shares may be paid in cash or, if the cooperative statutes allow that, in other kinds of assets - which must, however, be expressed in nominal value (Articles 36 to 38 of Cooperatives Act).

A member that resigns from the cooperative is entitled to be repaid in cash the value of his mandatory share determined on the basis of the annual report for the financial year in which the membership was terminated. The repayment of voluntary shares may be requested under the same conditions at any time, without the termination of membership in the cooperative. The cooperative's statutes may provide that the shares may also be assigned or sold to a member or to anyone acquiring membership, i.e. without repayment to the original member by the cooperative (Articles 39 and 39.b of Cooperatives Act).

A cooperative may issue financial instruments in accordance with the relevant legislation (Article 34(4) of the Cooperatives Act). There are no other more specific provisions concerning the financial instruments of cooperatives, so general rules of securities apply.

The cooperative must produce an annual financial report that must be examined by the supervisory organ and confirmed by the general meeting. The financial report must be submitted to the Agency of the Republic of Slovenia for Public Legal Records and Related Services (*Agencija Republike Slovenije za javnopravne evidence in storitve - AJPES*)[170] within eight months after the end of each financial year.

At least 5% of the annual surplus must be allocated to the legal reserves, unless the statutes have set the minimum capital requirement of at least 30.000 EUR and the legal reserves are not lower than the minimum amount of capital (Articles 43 and 39.a(3) of the Cooperatives Act). Apart from the legal reserves, a cooperative may form other types of reserves and funds and determine their purpose (voluntary funds).

[170] <http://www.ajpes.si/>.

The part of the annual surplus that is not allocated to the reserves or voluntary funds or used for another purpose may be distributed among the cooperative's members in proportion to the extent of their dealing with the cooperative, unless the cooperative's statutes provide otherwise (Article 45 of the Cooperatives Act).

In case of winding-up or liquidation of a cooperative, after the creditors have been repaid, first the voluntary shares and then the mandatory shares are repaid to the members. Net assets of the cooperative, remaining after all the shares have been repaid, must be distributed among the members in proportion to their shares, unless the cooperative's statutes provide otherwise. In case the cooperative owns assets which, in accordance with Article 74 of the Cooperatives Act, may not be distributed among its members even upon winding-up of the cooperative, and the cooperative is not a member of a cooperative association, such assets are transferred to the cooperative association from which they were obtained. In case no such cooperative exists, the assets are transferred to the cooperative association, the member of which the cooperative in question was in the past or, in other cases, to a cooperative association in which cooperatives with similar activities are associated (Article 48 of the Cooperatives Act).

3.7. Organisational profiles

Cooperatives must be organised in accordance with the two-tier system. The one-tier system may only be used in SCEs.

The bodies of a cooperative are the general meeting, the president of the cooperative and the supervisory board or at least one controller. A cooperative with ten or more members must also have an administrative board. A cooperative whose securities are traded on a regulated securities market must have a supervisory board and an audit committee. The statutes may provide that the cooperative also has a director or other organs (Article 14 of the Cooperatives Act).

The **general meeting** is the chief organ of the cooperative, consisting of all the members of the cooperative. The cooperative's statutes may provide, however, that the general meeting consists of representatives elected by the cooperative's members. Eligible for election as representatives at the general meeting are only cooperative's members; their statutory representatives; or persons who are employed at, or members of, another legal entity that is itself a member of the cooperative. The general meeting elects and may remove the president of the cooperative, the members of the administrative and the supervisory board or the controller, and the director, unless the statutes provide that the director is elected and removed by the administrative board (Article 15 of the Cooperatives Act).

Each member or representative holds one vote at the general meeting, unless the cooperative's statutes provide otherwise (Articles 16 to 18 of the Cooperatives Act).

Investor members may not exercise more than 25% of the votes of members present or represented at the general meeting. The statutes may set a lower threshold of investor members' votes or may provide that investor members do not have voting rights at all (Article 23(4) of the Cooperatives Act). Special provisions are in place for investor members of SCEs (Article 56.af of the Cooperatives Act), mirroring the provisions of Article 59(2) of Regulation 1435/2003/EC.

The regular session of the general meeting must be convened by the administrative board or by the president of the cooperative if there is no administrative board, after the end of each financial year. A special session of the general meeting may be convened whenever the cooperative's interests require so. The supervisory board or one tenth of the membership or at least one hundred members of the cooperative (the statutes may provide for a lower threshold) may also convene the general meeting (Article 20 of the Cooperatives Act).

The **president of the administrative board** also holds the function of the president of the cooperative. The president of the cooperative manages the cooperative and represents it in dealings with third parties and is responsible for the legality of conducting its business, unless these competences are transferred to the director. Only natural persons eligible for election as representatives at the general meeting may be elected the president of the cooperative or members of the administrative board or the supervisory board (Article 26 of the Cooperatives Act). Investor members of the cooperative may not form more than one quarter of members of the supervisory board or the administrative board (Article 33.a of the Cooperatives Act).

The **supervisory board** supervises the work of the president of the cooperative, of the administrative board, of the director and of other workers with special competences and responsibilities. The president of the cooperative, members of the administrative board, the director and other workers with special competences and responsibilities may not be elected members of the supervisory board. The supervisory board may not manage the business of the cooperative. The statutes may provide, however, that certain types of transactions are subject to authorisation by the supervisory board. If the supervisory organ refuses to give authorisation, the administrative board or the president of the cooperative may request that the general meeting decides on the authorisation of the transaction (Article 29 of the Cooperatives Act).

An **audit committee** is formed by the supervisory board. At least one member of the audit committee must be an independent expert in the fields of accounting or finance. Other members of the audit committee may only be members of the supervisory board (Article 29.a of the Cooperatives Act).

If the cooperative's statutes so provide, **the director** manages the cooperative in line with the law, the statutes, the general meeting's resolutions and the decisions of the administrative board, or of the president of the cooperative if there is no administrative board. The director represents the cooperative in dealings with third parties in accordance

with the competences conferred by the statutes or by the president of the cooperative. The director may be present at the sessions of all organs of the cooperative, without the right to vote. An organ may exclude the director's presence when deciding on a specific issue. The same person may not hold, at the same time, the functions of the director and a member of the administrative board or the supervisory board, or the controller (Article 30 of the Cooperatives Act).

3.8. Registration and control

Each cooperative must be registered in the general register of companies, which is kept by the District courts in accordance with the Court Register Act.[171] A cooperative gains legal personality with the date of the entry of its instrument of incorporation in the register (Article 7 of the Cooperatives Act).

Concerning the name, registered office, activity, representation of cooperatives and their registration, the rules governing companies apply by analogy (Article 56 of the Cooperatives Act).

No specific form of external control over cooperatives is foreseen in the law.

3.9. Transformation and conversion

The transformation of cooperatives and the transformation of other legal entities into cooperatives are regulated in Chapter VI.A of the Cooperatives Act (Articles 48.a to 48.š). Three types of transformation of cooperatives are possible:

- a merger (either by acquisition or by the formation of a new cooperative)
- a division (full or partial division or the transfer of a part of the cooperative's assets, either by acquisition or by the formation of a new cooperative)
- a conversion into a different legal form of enterprise.

For mergers and divisions of cooperatives, the rules of the Companies Act[172] governing the mergers and divisions of companies apply by analogy. This means that in general, a qualified majority of 75% of votes present at the general meeting of a cooperative is required to approve the merger or a division, unless the statutes provide a higher majority requirement or other additional conditions. In case different categories of shares exist, a majority of shareholders of each category has to be reached (cf. Article 585 of the Companies Act).

[171] Zakon o sodnem registru (ZSReg) (Uradni list RS, št. 13/94, 91/05, 111/05 Odl.US: U-I-212-03-14, 114/05-UPB1, 42/06-ZGD-1 (60/06 popr.), 33/07, 54/07-UPB2, 65/08, 49/09).

[172] Zakon o gospodarskih družbah (ZGD-1) (Uradni list RS, št. 42/06 (60/06 popr.), 26/07-ZSDU-B, 33/07-ZSReg-B, 67/07-ZTFI (100/07 popr.), 10/08, 68/08, 23/09 Odl.US: U-I-268/06-35, 42/09, 65/09-UPB3, 83/09 Odl.US: U-I-165/08-10, Up-1772/08-14, Up-379/09-8).

A cooperative may be converted into any form of company regulated in the Companies Act, other than an undisclosed partnership. It may also be converted into an economic interest grouping.

In case a cooperative is to be converted into a type of company the members of which would be liable for the company's debts, the conversion is only possible with the consent of all members of the cooperative who would become liable for the company's debts after the conversion. For the transformation of the cooperative into an economic interest grouping, consent of all members of the cooperative is needed.

3.10. Specific tax treatment

Cooperatives are subject to the standard tax law treatment for companies and enterprises. The main tax laws that apply are the Corporate Income Tax Act[173] and the Value Added Tax Act.[174]

3.11. Existing draft proposing new legislation

Before the latest amendments to the Cooperatives Act, a special system of cooperative auditing was in place as a form of independent external auditing of cooperatives, performed by qualified cooperative associations with a special permit (auditing cooperative associations). This system was abolished in 2009 and now the same rules apply for the auditing of cooperatives as for the auditing of companies. The main concern of the legislature was the perceived lack of independence of the cooperative association when performing the audit. Apart from that, the Auditing Act[175] does not provide the option that the external auditor is organised as a cooperative.

This change in the legislation was met with considerable dissatisfaction by a significant part of cooperatives, who believed that the system of cooperative auditing should remain in place as it is explicitly mentioned as acceptable in recital 11 of the preamble to the Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.[176] Therefore, a draft law was proposed by MPs of certain opposition parties that would amend the Cooperatives Act and re-introduce the system of cooperative auditing.[177] In May 2010, the National Assembly voted against the adoption of the proposed law.

[173] Zakon o davku od dohodkov pravnih oseb (ZDDPO-2) (Uradni list RS, št. 117/06, 90/07, 56/08, 76/08, 92/08, 5/09, 96/09).
[174] Zakon o davku na dodano vrednost (ZDDV-1) (Uradni list RS, št. 117/06, 33/09, 85/09, 10/10-UPB2).
[175] Zakon o revidiranju (ZRev-2) (Uradni list RS, št. 65/08).
[176] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, Official Journal L 157 , 09/06/2006 P. 0087 – 0107.
[177] Zakon o spremembah in dopolnitvah Zakona o zadrugah /ZZad-D/ EVA: 2008-1211-0911 EPA: 0911-V.

3.12. Essential bibliography

The following essential bibliography deals with the organisation and regulation of cooperatives in general from the point of view of Slovenian law:

- Franci AVSEC, Zakon o zadrugah s komentarjem, sodno prakso in primerjalnopravnim orisom (*Cooperatives Act with Commentary, Case-Law and Comparative Law Overview*), GV Založba, Ljubljana, 2008.
- Anita JAKUŠ, Bojana JERINA (editors), Zadružništvo kot model uspešnega poslovnega organiziranja v Sloveniji: zbornik gradiv (*Cooperatives as a Model of Successful Business Organization in Slovenia*), Ljubljana, Zadružna zveza Slovenije, Ljubljana, 2009.
- Franci AVSEC, Zadruga v primerjalnem pravu (*The Cooperative in Comparative Law*), Biotechnical Faculty, Agronomy Department, Institute of Agrarian Economics, Ljubljana, 1996.
- Andrea GRAJNER, Novi organizacijski modeli kmetijskih zadrug v Sloveniji in Evropski uniji: magistrsko delo (*New Organizational Models of Agricultural Cooperatives in Slovenia and European Union: M. Sc. Thesis*). Maribor: [A. Grajner], 2008.
- Franci AVSEC, Kapital zadruge in člani investitorji (*Equity Capital and Investor's (Non-Patron) Membership in Cooperatives*), Podjetje in delo #3-4/2008, p 557.
- Franci AVSEC, Članstvo zadruge v drugih pravnih osebah (*The Membership of Cooperative Society in Other Legal Persons*), Podjetje in delo, #2/1997, str. 203.
- Franci AVSEC, Primož ŽERJAV, Tretja novela Zakona o zadrugah za večjo privlačnost te organizacijske oblike (*The Third Amendments to the Cooperatives Act to Improve the Attractiveness of the Organizational Form*), Pravna praksa #44/2009, p. 10.
- Paolo BRUNI, Nove poti zadružništva: gradivo posveta (*New Paths for Cooperatives: Symposium Materials*), Zadružna zveza Slovenije, Ljubljana 2010.
- Franci AVSEC, Primož ŽERJAV, Zakon o zadrugah z uvodnimi pojasnili (*Cooperatives Act with Introductory Remarks*), GV založba, Ljubljana 2010.

4. The SCE Regulation and national law on cooperatives

The influence of the SCE Regulation on national law

As mentioned, the SCE Regulation was implemented by amending the existing Cooperatives Act and inserting into it a new chapter regulating SCEs. The provisions of this chapter are relatively detailed and offer some options concerning SCEs that are not available for regular cooperatives (e.g. the choice between one-tier and two-tier system of governance, the transfer of registered office, etc.).

Some harmonisation effect of the SCE Regulation is noticeable as certain solutions provided by the Regulation have been introduced as general rules of the national law of

cooperatives. For example, the definition of the aim of a cooperative was expanded to include the development of the economic and social activities of its members (Art. 1); the option of limiting the variability of the capital by the cooperative's statutes was added (Art. 39.a); the possibility of accession of investor members to the cooperative was introduced (Art. 8.a); the option of transferring the share without repayment was introduced (Art. 9); the option was added for the statutes to provide that certain types of transactions are subject to authorisation by the supervisory board (Art. 29).

The main trends in using of the cooperative form of enterprise in Slovenia

In Slovenia, the cooperative form of enterprise is by far prevailing in the sector of agriculture and forestry. A vast majority of Slovenian cooperatives are active in this field and most of the cooperative membership is formed by farmers. The activity of agricultural cooperative enterprises usually extends to food processing and the sale of food products, which often includes wholesale and retail trade of such products through own shops. 73 of the major cooperatives active in this sector are associated in Zadružna zveza (Cooperative Association), which is itself also organised as a cooperative. The purpose of the association is to support and promote the development of the cooperative form of enterprise and to represent the interests of its members. Zadružna zveza and its members are also members of Kapitalska zadruga, a cooperative that owns the majority of shares in the commercial bank Deželna banka d.d.

Legal barriers or obstacles to the development of the cooperative form of business

There are no specific restrictions concerning the activity of cooperatives. Article 56(2) of the Cooperatives Act explicitly states that a cooperative may perform any activity under the same conditions as companies. Since 1990, the cooperative form of enterprise may be used in any sector (barring financial institutions, which usually require the form of a public limited-liability company). However, cooperatives are still perceived in the general public and by the state authorities as a type of organisation only relevant in the sector of agriculture and forestry. Therefore, for example, the Ministry of Agriculture, Forestry and Food is responsible for the legislation on cooperatives, and not the Ministry of the Economy, which is responsible for the corporate law in general. This leads to many practical obstacles for cooperatives active in other economic sectors, such as small crafts, for example the inability to obtain various support services of the ministries or to compete for the grant of subsidies or co-funding of development projects. Therefore, cooperatives active in non-agricultural sectors feel that they do not operate on an equal footing with other commercial subjects. Again, this is not a result of any formal limitations, but mostly of the misperception that the cooperative form of enterprise is only suitable for agricultural and forestry activities. This was the main complaint concerning the national regulation of cooperatives as expressed by representatives of 12 Slovenian cooperatives interviewed.

The opinion was expressed that the cooperative as a form of enterprise should be regulated in the Companies Act and have equal position as other types of companies; the specifics of cooperative organisations in certain fields, such as agriculture or housing cooperatives, however, should be regulated in separate legislative acts. A common opinion was also that an appropriate measure for the promotion of cooperatives would be a special, more favourable taxation regime, taking into account the nature of the cooperative form of organisation.

It is possible to speculate that the SCE Regulation, with its clear reference to and consideration of cooperatives as a particular type of commercial company, might eventually help in the process of considering national cooperatives capable to act in all sectors of the economy and not only in agriculture. It seems that the recent changes in the Cooperatives Act are a small step in this direction, as they refer in several instances to the use of the provisions of the Companies Act by analogy, thus bringing together the rules of cooperatives and other commercial companies. However, the prevailing attitude towards cooperatives will probably only change once a higher number of cooperatives become active in other commercial activities in Slovenia. It can be expected that this will occur in the future, since many of the originally agricultural cooperatives are expanding their activities in other fields and it is likely that some SCEs from other Member States will eventually also operate in the Slovenian market.

SPAIN

By Rosalía Alfonso Sánchez

SUMMARY. 1. The implementation of SCE Regulation 1435/2003 in Spanish legislation. – **1.1.** Source, time and modes of implementation. – **1.2**. Structure and main contents of the - *maybe Spanish future* - regulation. – **1.3.** The designated Authority/ies as required by art. 78, par. 2, SCE Reg.**.** –**1.4.** Essential bibliography. – **2.** A comment on the implementation of the SCE Regulation in Spanish legislation. – **2.1.** National debate on the implementation of the SCE Regulation in Spain. – **2.2.** Whether or not national legislators have taken the SCE Regulation seriously by providing effective measures for the creation and promotion of SCEs. – **2.3.** Whether or not the expectations behind the SCE Regulation (if any) have been met or disappointed. – **2.4.** Why the SCE legal form has not been adopted by national cooperatives for cross-border activities. – **2.5.** Why other (national or European) legal forms or strategies have been preferred. – **3.** Overview of national cooperative law. – **3.1.** Sources and legislation features. – **3.2.** Definition and aim of cooperatives. – **3.3.** Activity. – **3.4.** Forms and modes of setting up. – **3.5.** Membership. – **3.6.** Financial profiles. – **3.7.** Organisational profiles. – **3.8.** Registration and control. – **3.9.** Transformation and conversion. – **3.10.** Specific tax treatment. – **3.11.** Existing draft proposing new legislation. – **3.12.** Essential bibliography. – **4.** The SCE Regulation and national law on cooperatives. – Annex I. Spanish legislation on cooperatives. – Annex II. Law on the European Cooperative Society with its registered office in Spain (Project)

1. The implementation of SCE Regulation 1435/2003 in Spanish legislation

1.1. Source, time and modes of implementation

In Spain the SCE Regulation will be implemented through a specific law passed by the State itself. The project of Law is, at this moment, at Parliament, and it could be the light so soon.

The Council Directive 2003/72/EC, of 22 July 2003, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees has been incorporated into our Legal system through Act 31/2006, as of October 18th, about employee involvement in a European Company and in a European Cooperative Society.

This Act 31/2006 has been amended by subsequent Act 3/2009, as of April 3rd, on the structural modifications of companies which, through its Third Final Provision, has opened the door for new Title IV provisions on intra-Community cross-border mergers of limited-liability companies, in order to comply with the requirement for incorporation of Article 16 of Directive 2005/56/EC, in a matter as important and technically complex as that of employee participation in the company resulting from the cross.

1.2. Structure and main contents of the *–maybe Spanish future* - regulation

Notice: You will check the Project of Law terms in Annex II

A) Pointing out if the law implementing the SCE Reg. is voluminous or concise

The Project of Law on the European cooperative which has its registered office in Spain is concise. It is structured in four chapters and has twenty articles, an additional provision, and three final disposals.

Chapter I lays down the "General provisions". It is divided into five articles that contain rules about "regulating on the SCE", the "SCE regularisation", the "registered and publication of private individuals concerning an SCE", the "transfer of registered office to another Member State", and the "opposition to the transfer of registered office to another Member State".

Chapter II tries to provide some rules in order to lead the proper formation of an SCE in the case of formation by merger and by conversion. Its five articles established the following matters: the "appointment to one or more expert who shall examine the draft terms of merger", the "right to resignation/severance for the members in case of formation by merger", the "certificate related to the merging society", the "registered of the society formed by merger", and the "conversion of an existing cooperative society into a European cooperative society".

Chapter III contains some aspects related to the SCE's structure of organs. It allows the statute option between the one-tier or the two-tier administrative organ system (art. 11) and established the applicable rules to each one: the cooperative legislation to the one-tier system (art. 13) or the special provisions (contained in the arts. 14 to 19) to the two-tier one. The Chapter dedicates an article (12) to the liability of the members at the administrative organ.

Chapter IV just refers to the case of SCE winding-up by the court or other competent authority of the Member State which the SCE has its registered office.

B) Clarifying if and to what extent the law implementing the SCE Reg. meets those obligations and exercises those options that the SCE Reg. respectively imposes on, and grants Member States

Foreword:

To provide the requested information in this section it has been considered fit to use the scheme of hierarchy of sources provided in art. 8 CRSCE and indicate the preliminary reports contained in the **"**Project of Law on SCE which has its registered office in Spain". What goes next in italics comes from articles from the Project concerning several provisions in the SCE Council Regulation.

1º) Council Regulation of SCE (art. 8.1.a) CRSCE), which brings in four different categories of rules:

A) The new and specific applicable rules to the SCE

B) The law applicable, in the Member State where the SCE has its registered office, to cooperatives (when the Council Regulation refers to). For instance, the **"**Project of Law on the SCE which has its registered office in Spain" lays down the aspects that follow[178]:

- "Forms of publication of the transfer proposal provided for by the Member State of the registered office" (art. 7.2 CRSCE).

Article 3. Registered and publication of particulars concerning a European cooperative society

3. "(…) Publication of documents and particulars concerning a European cooperative society with its registered office in Spain shall be effected in the event and in the manner laid down in the general provisions to public limited-liability companies law".

b) "A single report (drafted by independent experts) for all merging cooperatives may be drawn up *where this is permitted by the laws of the Member States to which the cooperatives are subject*" (art. 26.2 CRSCE).

Article 6. Appointment to one or more expert whose shall examine the draft terms of merger

"In the event that one or more Spanish cooperative societies will be involved in the formation of a European cooperative society by merger or when the European cooperative society will locate its registered office in Spain, one or more independent experts must study the merger-project and draw up a written report as provided for in Article 26 of the Council Regulation (EC) no. 1435/2003".

c) "Members of (...) administrative organ shall be liable, *in accordance with the provisions applicable to cooperatives* in the Member State in which the SCE's registered office is situated, for (...)" (art. 51 CRSCE).

Article 12. Liability of the members of the administrative organ

The liability provisions laid down to the members of the administrative organ of the public limited-liability companies shall be applied to the members of the administrative organs, in the field of their respective duties.

d) "As regards winding-up (...) an SCE shall be governed *by the legal provisions which would apply to a cooperative formed in accordance with the law of the Member State* in which its registered office is situated (...)" (art. 72 CRSCE).

Article 20. Winding-up by the court or other competent authority of the Member State where the SCE has its registered office

The competent authority to order the SCE to be wound up in the cases covered by paragraph 1 from article 73 of the Council Regulation (EC) no. 1435/2003, shall be the Commercial magistrate of the SCE registered office.

C) The public limited-liability company law of the Member State in which the SCE has its registered office:

[178] Some other references indicated by the CRSCE are regulated by the Spanish cooperative laws.

Competent Registrar to register the SCE and publish its acts and by-laws and the acquisition of legal personality (arts. 11.1 y 5,. 7.9, 18.1 CRSCE).

Article 3. Registeration and publication of particulars concerning a European cooperative society.

1. A European cooperative society shall be registered in the Commercial Register in accordance with its registered office.

2. The SCE's formation project shall be deposited at the Commercial Register from the SCE's registered office.

3. Formation and the rest of the particulars concerning a European cooperative society that has its registered office in Spain shall be registered in the Commercial Register in accordance with the law applicable to public limited-liability company. Publication of documents and particulars concerning a European cooperative society with its registered office in Spain shall be effected in the event and in the manner laid down in the general provisions to public limited-liability companies law.

4. May not be registered in the Commercial Register a European cooperative society that wants to establishe its registered office in Spain whose corporate name matches that of pre-existing Spanish society.

5. The Central Commercial Register will be the relevant office in order to issue the suitable denying notifications for SCE´s, after duly checking there is no other cooperative with a matching corporate name registered at both the Central Commercial Register and the correspondent Regional ones, which shall all be coordinated

D) The law of the Member State in which the SCE has its registered office:

a) Laws that implement Directives:

> *V.gr., Law 31/2006, passed on October 18th 2006, about employee involvement in a European Company and in a European Cooperative Society* (This law implements the Directive 2003/72/EC).

b) Laws that implement some other sort of law or rule.

2º) The provisions of the statutes of the SCE where expressly authorised by the Council Regulation (art. 8.1.b) CRSCE).

3º) The laws adopted by Members States in the case of matters not regulated by the CRSCE or where matters are only partly regulated by it, of those aspects not covered by it (art. 8.1.d.i). CRSCE).

A) In most cases, the CRSCE *empowers* the States to regulate certain aspects, such as that envisaged by the **"**Project of Law on the SCE which has its registered office in Spain":

a) "A Member State *may impose* on SCEs registered in its territory the obligation of locating the head office and the registered office in the same place" (art. 6 CRSCE).

> *Article 1.1 (in fine). The registered office of a European cooperative society shall be located in Spain when the SCE has located his head office in the Spanish territory.*

b) The laws of a Member State *may provide* that the competent authority could oppose the transfer of an SCE's registered office to other Member State based only on grounds of public interest (art. 7.14 CRSCE).

Article 5. Opposition to the transfer of registered office to another Member State

1. The transfer of the registered office of a European cooperative society which has its registered office in Spain to another Member State which would result in a change of the law applicable shall not take effect if the Spanish Government, taking into account the Justice and Labour and immigration Ministries proposal, or the Government Council from the authorized Autonomous Region, opposes it. Such opposition may be based only on grounds of public interest.(...).

c) "Member States *may (...) adopt* provisions designed to ensure appropriate protection for members who have opposed the merger" (art. 28.2 CRSCE).

Article 7. Right to resignation/severance for the members in case of formation by merger

The members of Spanish cooperative societies who opposed the merger decision in the case of merger by the formation of a new European cooperative society with its registered office in other Member State, could be able to resign/separate from the society according to the applicable cooperatives legislation. This very right will also apply to the members of a Spanish cooperative society that is acquired by a European cooperative society with its registered office in other Member State.

d) "Where no provision is made for two-tier system in relation to cooperatives with registered offices within its territory, a Member State *may adopt* the appropriate measures in relation to SCEs" (art. 37.5 CRSCE).

Article 1. Applicable legal framework for administration systems2. The European cooperative society which has its registered office in Spain may choose between either the one-tier or the two-tier administrative organ system, and must established that choice in its statutes.

B) Sometimes the CRSCE *requires* Member States to regulate certain aspects, such as that envisaged by the **"**Project of Law on the SCE which has its registered office in Spain":

a) "The Member State in which the SCE's registered office is situated shall take appropriate measures to oblige the SCE to regularize its situation (…) (art. 73.2 CRSCE), and to ensure that an SCE which fails to regularize its position (...) is liquidated" (art. 73.3 CRSCE).

Article 2. European cooperative society regularisation

1. When the SCE's head office gives up being in Spain, the SCE shall regularize its legal framework in a year. The SCE may do that by re-locating its head office in Spanish territory or by transferring this to another Member State.

2. When the European cooperative societies described in the above paragraph do not regularize their legal framework in a year, they shall wind-up by the general

procedure laid down on the cooperative applicable law. The Spanish Government, or the regional organ appointed by the authorized Autonomous Region, may designate the natural person who must inspect, chair the liquidation and watch over the laws' and statutes' enforcement.

b) Each Member State shall designate the competent authority to allow the transfer of the registered office (art. 78.2 and 7 CRSCE).

Article 5. Opposition to the transfer of registered office to another Member State

1. The transfer to the registered office of a European cooperative society which has its registered office in Spain to another Member State which would result in a change of the law applicable shall not take effect if the Spanish Government, taking into account the Justice and Labour and immigration Ministries proposal, or the Government Council from the authorized Autonomous Region, opposes it. Such opposition may be based only on grounds of public interest.

c) Each Member State shall designate the competent authority in case of winding up (art. 78.2 CRSCE).

Article 20. Winding-up by the court or other competent authority of the Member State where the SCE has its registered office

The competent authority to order the SCE to be wound up in the cases covered by paragraph 1 from article 73 of the Council Regulation (EC) no. 1435/2003, shall be the Commercial magistrate of the SCE registered office.

4º) The cooperatives regulation applied inside the Member State where the SCE has its registered office in regard to all those aspects without prevision in the Council Regulation (art. 8.1.c).ii CRSCE).

5º) The provisions of the Statutes of the SCE, in the same way as for a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office (art. 8.1.c).iii) CRSCE).

C) Clarifying if and to what extent the law implementing the SCE Reg. contains measures enabling or facilitating the formation of SCEs, as required by article 78, paragraph 1, of the SCE Reg.

In the case of matters not regulated by the CRSCE or where matters are partly regulated by it, or those aspects not covered by it (art. 8.1.c) CRSCE), Spanish law may or shall (depending on the event) adopt some rules to cover the above-cited cases (art. 8.1.c) CRSCE), but the **"**Project of Law on the SCE which has its registered office in Spain" does not included those. That can be seen in the following aspects:

a) When the CRSCE *empowers* the Member States to regulate certain aspects of the SCE, as provided in the following articles in the Council Regulation*:* 2.2[179]; 7.7.2º; 11.4.2º;

[179] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 317 LSA).

12.2; 21.1[180]; 35.7; 37.1; 37.2.2º; 37.4[181]; 39.4[182]; 40.3; 42.1; 42.2[183]; 42.4; 47.2.2º; 47.4; 48.3[184]; 50.3; 54.1; 61.3.2º; 68.1.

b) When the Regulation *requires* Member States to regulate certain aspects of the SCE, as provided in the following articles of Council Regulation*:* 73.4[185] y 78.2[186].

D) Main contents of the law implementing the SCE Reg.

The Project of Law does not provide any specific rules about operational, territorial or any other kind of restrictions

According to art. 8.2 CRSCE, *"If national law provides for specific rules and/or restrictions related to the nature of business carried out by an SCE, or forms of control by a supervisory authority, that law shall apply in full to the SCE".*

For further information, see below 3.3 because the comments in 3.3. part of this final report are applied *mutatis mutandis* here.

1.3. The designated Authority/ies as required by art. 78, par. 2, SCE Reg.

Article 7 CRSCE (Transfer of the registered office): Government or Regional Council of Government (art. 5 Project of Law)

Article 21 CRSCE (Opposition to a merger): No designated yet

Article 29 CRSCE (Certify attesting to completion of the pre-merger acts and formalities): Cooperatives Registrar and Commercial Registrar (art. 8 Project of Law)

Article 30 CRSCE (Scrutiny of legality of merger): Cooperatives Registrar and Commercial Registrar (art. 8 Project of Law)

Article 54 CRSCE (General meeting convened by a competent authority): Commercial Magistrate (art. 23 LCoop)

Article 73 CRSCE (Competent authority to order the SCE to be wound up in the cases covered by paragraph 1 from article 73): Commercial Magistrate

[180] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 318 LSA).
[181] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 331 LSA).
[182] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 331.1 LSA).
[183] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 328 LSA).
[184] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 334 LSA).
[185] Aspect regulated, however, by the Law 27/1999, passed on July 16th, of Cooperatives.
[186] Aspect regulated, however, by the Law 19/2005, passed on November 14th, about the SE which has its registered office in Spain (vid., art. 337 LSA).

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2. A comment on the implementation of the SCE Regulation in Spanish legislation

2.1. National debate on the implementation of the SCE registered in Spain

A) Previous

The CRSCE contains constant reminders to the law of the Member State where the cooperative has its registered office, either in the matter of cooperatives, of public limited-liability companies, or whether it is a question of rules that have incorporated a certain Directive, or with regard to the fact of being specifically designed for the SCE which has its registered office in it.

The Council Regulation takes care of the access roads to the figure, of the rules of formation - it considers the constant references to the law of the Member State, the regime to transfer the SCE's registered office, structure the organs, of some aspects of the economic and financial regime and, logically, of those linked to the employees involvement in a SCE by the Directive 2003/72/CE. That said, it will apply dispositions from the CRSCE itself (and, where fit, the statutory rules of the concrete SCE when the RSCE authorizes it specifically), discarding the application of the national rules on cooperatives. Moreover, the rules dictated by the Member States for the SCEs which have their registered offices in their territory cannot specifically regulate aspects in the CRSCE in conflict with their rules.

In addition to this, and since the legal regime of the cooperative has not been the subject of harmonization in Europe as it has been in the case of public limited-liability companies, the differences between law systems are remarkable. Thus, if the "calls" of CRSCE to the public limited-liability companies law of the Member State where the SCE has its registered office for concrete aspects of its regulation - or to the legislation that incorporates certain Directive [presumably] can give rise to substantial differences from some legal systems to others, the remissions to the cooperative legislation can bring about even more remarkable differences.

Besides, the CRSCE foresees that Member State laws can behave as complementary rules in some cases:

a) The Member State Law applicable to the cooperatives – meaning, the one from the Member State where the SCE has its registered office – will act as auxiliary as in the legal regime of the SCE when it comes to fill unexpected voids within the CRSCE, which is why it will only be considered whenever the need arises and provided the CRSCE does not offer a suitable alternative.

b) The Member States can or must adopt rules - in a complementary fashion - in any of the following situations.

- When developing some of the previsions of the CRSCE (art. 8.1.c)

The art. 8.1.c) CRSCE establishes that Member States may adopt rules with auxiliary character, ancillary. But this rule is completed by the art. 78 CRSCE, which imposes to the Member States two obligations. The first one, "to designate the competent authorities" that are to take part in the cases of transfer of the SCE's registered office (art. 7 CRSCE), formation by merger (arts. 21, 29 and 30 CRSCE), with faculty to summon, where fit, the General meeting (art. 54 CRSCE) or to ask for the winding-up of the SCE in certain cases (art.73 CRSCE). The second one, "to make such provisions as appropriate to ensure the effective application of this Regulation".

In the event of the SE, the Spanish legislator decided to provide the new figure with internal rules: the Law 19/1995, passed on November 14th, on the SE which has its registered office in Spain, which introduces a new Chapter in the public limited-liability companies law (Chapter XII "About the SE") whose integrated articles 312-338 in its three

sections (foreword, formation and governing bodies)[187], thus authorising the Government to fulfil previous rules that will modify the Law 19/1995 and to prepare future modifications for the Regulation of the Companies Registrar.

- When applying specific rules from the EU for the SCE (art. 8.1.c).i) CRSCE

The CRSCE also refers to – as complementary rules – to those dictated from the Member States in the application of specific measures dictated by the European Union. When it comes to what these measures should be, maybe Directives are the ones in charge of harmonizing the cooperative area; or perhaps such expectations talk about the Directive applicability on the assignment of the workers and employees in the SCE; and also it could have to do with the international standards of accountancy. Any of the past hypotheses is plausible.

B) Then, what are the causes for the non-existence of legislation in Spain that complements the CRSCE?

a) The problem with the applicable Laws of cooperatives (either with integrating or auxiliary function) to an SCE which has its registered office in Spain

The CRSCE grants an outstanding role to the criteria of real establishments for the society, making it out as the place where the head office of the SCE is located. Its function is, basically, to point out the subsidiary law applicable to a SCE formed according to the CRSCE, therefore making specific cues to the competent Registrar for its registration (art. 11.1 CRSCE).

That determining role can be noticed through different rules in the CRSCE, like for instance art. 6 CRSCE, where it arranges that the registered office of an SCE shall be located, within the Community, in the same Member State as its head office, enabling the Member State to impose the obligation to locate the head office and the registered office in the same place; or the art. 8 CRSCE, which places the SCE under the law applicable to a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office; the art. 9 CRSCE, which contains the principle of non-discrimination; or the art. 14 CRSCE, which sanctions the principle of effective address.

However, some rules deviate from this criteria, like art. 7.16 CRSCE, which, in the case of transfer of the SCE's registered office to another Member State, and as for claims raised up prior to the same, declares that the SCE is subject to the law of the State of origin, even though the interposition of the demand is subsequent to the transfer.

Anyway, and with a general approach, the criteria of the social address of the SCE is going to determine the applicable national Law, as it also underlines the law applicable to the AEIE and to the SE, respectively.

In our legal system, this circumstance has not brought about any obstacle when applying the CRAEIE and, in regard to the dispositions of Law 9/2005, it will not cause it with the CRSE; but the question is not so simple concerning the SCE, basically because of

[187] Actually, see Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el Texto Refundido de la Ley de Sociedades de Capital.

the existence of two legislative powers with the capability of drafting laws in the matter of cooperative societies, which are state and autonomic ones.

- According to the criteria of the address that imposes the CRSCE to select the law applicable, a SCE with its registered office in anyone of the Autonomous Regions, will be subject to the Law of Cooperatives of this Community (if the Autonomous Region has own law, and otherwise, the state law of cooperatives), regardless of any other circumstance (like, for instance, where it develops the main cooperative activity).

- But according to the criteria to specify the applicable law of cooperatives that rules in our legal system – where the place where the cooperative activity is mainly made – a Spanish cooperative placed in the same territory that the SCE of our example, could not be put under the same regulating law that this one.

This circumstance could bring about internal situations that, by comparison, lack logic. Indeed, the paradox of national cooperatives with cooperative activity in more than one Autonomous Region, but none with main character, under the state law of cooperatives (art. 2.a) LCoop), and those of transnational European cooperatives put under the autonomic law of the address. Situations like these would go against the very principle of non-discrimination.

b) The problem of the territorial arrangement of the Spanish State and the competition (State or Autonomic) to dictate developing norms to foresee the CRSCE or in the application of specific measures dictated by the EU for the SCE

The Autonomous Regions are authorized to dictate whichever dispositions are necessary in sequence to the application (in this case) of the CRSCE, as long as the issues in which it is required concern the competent scope of those. And because when the EU rule allows its development, the internal distribution of the competitions between the central Institutions of the State and the Autonomous Regions cannot be modified; the Autonomous Regions can develop rules and prescribe the EU Law if the matter in need of development corresponds to them directly according to its respective “Statutes of Autonomy”, adjusting to the demanded thing or allowing by the community (EC) rule.

Then, we will have to pay special attention to the specific aspects of development, execution or application so as to determine whether the State or the Autonomous regions are the rightful holders of this competence.

Thus, for example, the faculty that the RSCE grants to the Member States to anticipate modifications of the national dispositions of development of the Directives 78/660/CEE and 83/349/CEE in order to reflect the mannerisms of cooperatives (art. 68,1 CRSCE), will correspond to the central State and not to the Autonomous Regions, given its competence in the tax area; or the faculty to adapt the Regulation of the Companies Registrar to the obligatory inscription of the SCE; whereas, on the contrary, for instance, the establishment of a maximum, minimum number or both of members of the control element (art. 37.4 RSCE), will be incumbent to the Autonomous Regions due to its cooperative legislation character - although also to the Spanish State for the cooperatives in the exigencies

mentioned on the art. 2 LCoop. All this, of course, regardless of the constitutional obligation of the Spanish State (art. 93 Spanish Constitution) to control the observance of EU Law. But the problem is not only to determine what areas are to be handled by the central administration and which belong to the Autonomic scope, but once made specific that is an autonomic competition, it is time to try and get the regulation that emanates of the different legislative organs as homogenous as possible. The difficulty lies in determining through what standard it is possible to reach that homogeneity, as long as, and provided, it acts like basic premise, exists a convergent will.

As far as the application of the CRSCE by the Autonomous Regions go, it may lead to different results when it comes to the regime of rights and arising obligations of the same (just as the content from the different autonomic laws on cooperatives is and in spite of the harmonising effectiveness of the cooperative principles in our legal system), the solution could come by the route of a harmonization law (Art. 150,3 EC), if it is noticed that serious discriminations in the legal patrimony of the individuals exist.

And perhaps it is also possible to resort, in search of an essential coordination, to the institute of the “Sectorial Conferences”. These conferences (integrated by members of the Government, in representation of the General Administration of the Spanish State, and by members of the Councils of Government, in representation of the Administrations of the Autonomous Regions) are bodies of cooperation in those matters in which competent interrelation exists, with functions of coordination or cooperation. The experts indicate that the “Sectorial Conferences” are called to carry out a double committed: a) to ensure the necessary cohesion for the action of the public powers and the essential coordination, and, b) to exchange points of view and to examine the most common problems of each sector and the projected actions to confront them and to solve them. They can even decide to accomplish a plan or programs set from the predicted ones in Art. 7 of Law 30/1992.

c) Solution adopted by the Project of Law: Art. 1.2. “The European cooperative society (SCE) having its registered office in Spain shall be governed by both the rules provided in the Council Regulation (EC) no. 1435/2003 of 22 July 2003, the previsions of this Law and by the applicable cooperative law regarding the territory in which the cooperative developed mainly its cooperative activities in case of matters not regulated by the Council Regulation, and by the Law 31/2006, passed on October 18th 2006, on the involvement of employees in a European Company and in a European Cooperative Society”.

2.2. Whether or not national legislators have taken the SCE Regulation seriously by providing effective measures for the creation and promotion of SCEs.

Taking into account all the issues described above, the Spanish legislature has taken the SCE Council Regulation seriously, and we can be positive about the implementation of the CRSCE in Spain so quickly.

First:

In Spain there is a rule in order to regulate the employee involvement in an SCE (and SE) which has its registered office in Spain: the Law 31/2006, passed on October 18th 2006, that incorporates the Directive 2001/86/CE, of the Council, passed on October 8th 2001, to our internal Law system

Second:

The "Balance of the Program of Promotion of the Social Economy - May 2008-November 2009", elaborated by the Ministry of Work Affairs and Immigration at the Spanish Government, points out [in section 5). F, page 2], that it is currently making a first draft of Law of European Cooperative Society registered in Spain.

(http://mtin.es/es/sec_trabajo/autonomos.htm).

Third:

There is a **"**Project of Law on the SCE which has its registered office in Spain" into the Parliament process.

Fourth:

The fact (until now) that our state does not have a law governing the SCE registered in Spain has not prevented the creation of an SCE whose registered office is located in Spanish territory.

It is a Schooling SCE registered in Vizcaya (Basque Country) formed by educational-cooperatives formed and governed under the basque country law of cooperatives and by educational-cooperatives formed and governed under the French law of cooperatives (data on this SCE can be found in this expert completion of questionnaires proposed by the Scientific Committee of this contract, in the so-called Section 1).

However, the case is exceptional since its establishment and registration has been possible for reasons that approach much more political convenience rather than legal one. This SCE itself has requested us to be discrete about the information and publicity given in this report regarding its creation. What is certain is that the SCE has ended the debate on the law applicable to the SCE established in Spain. In its writing and bylaws it is stated that the SCE shall be governed by the provisions of the Council Regulation on the SCE and the Cooperatives Law of the Basque Country.

2.3. Whether or not the expectations behind the SCE Regulations (if any) have been met or disappointed

In Spain, traders lack sufficient information on the SCE, which is regulated without being presented, except for the regulation of the Council, without having been implemented in a proper national law, thus remaining alien to those who can advise on the suitable aspects of using this figure to groups interested in transnational operations.

2.4. Why the SCE legal form has not been adopted by national cooperatives for cross-border activities

Because of ignorance of the figure, lack of information concerning the nature and function, because of lacking of specificity of the cooperative legislation applicable (state or regional) and a law that implements the Council Regulation on the SCE.

2.5. Why other (national or European) legal forms or strategies have been preferred

To face cross-border activities, Spanish cooperatives prefer to go to the art of creating larger enterprises through merger or by using the possibility of establishing second degree cooperatives and cooperative groups, cooperative forms of integration in both regulated state law (arts. 77 and 78) as in most of the regional cooperative laws.

3. Overview of national cooperative law

3.1. Sources and legislation features

In Spain, the Autonomous Regions have exclusive competences in the scheme of cooperatives. That is the reason why there are 14 autonomic laws of cooperatives so far. Each autonomic cooperative law can be applicable to those cooperatives that develop their internal activity mainly in their own territory. Some Autonomous Regions assumed even a huge number of competences regarding the organization, regime and internal operation of the institutions of cooperative credit[188].

Besides that, there is a state cooperative Overall Law 27/1999, of 16 of November (LCoop), that is applicable to the cooperatives that develop their cooperative activity in more than just one Autonomous Region, but in no one with main character; and, perhaps, to the cooperatives of Ceuta and Melilla (2 art. LCoop).

There is no division into a general law and one or more special laws on single types of cooperatives (there are some little exceptions to that, like we will see). Neither about regional laws nor state law. By the way, each cooperative law oversees all the general matters and contains the special rules to special types of cooperatives.

However, this territorial cooperative law distribution has to coexist with each sector's own rules, such as credit, insurance, transport or housing, for instance. That is so because in Spain certain activities have to be regulated by the state, regardless of the special type

[188] The autonomic regulation of the cooperative credit has not been an easy question as it has become the main reason for several issues before the Constitutional Court bassed on Art. 149.1.11ª EC.

of company that would like to do that (limited company, limited liability company, mutuals, cooperative).

So, we have special laws dictated by the State that affect the cooperatives that dedicate themselves to certain activities, but we have also special laws dictated by some Autonomous regions for special types of cooperatives (these are the exceptions we wrote about before). It is the case of the special cooperatives of Extremadura, or of the small cooperative society of Basque Country, which, in our opinion, could have been regulated on their own general laws of cooperatives through the technique of the incorporation of the new type to the general rule.

Finally, there are also tax laws that affect the cooperatives and that, once again, in regard to the territorial distribution of the Spanish State in autonomous regions, and by the necessary respect that imposes our Constitution to the Provincial "Right" calls of some of them, it brings about the distinction between a law of tax regime that affects all Spanish cooperatives, except for of those established on the Basque Country or on the Provincial Community of Navarre, where they enjoy a special and diverse tax regime that prevails and rises above the State one.

You can see all those matters in Annex I.

3.2. Definition and aim of cooperatives

The first paragraph from Article 1 of the Spanish state cooperative law (LCoop) defines a cooperative as *"a company formed by persons that join themselves on a regimen based on free membership and free resignation, to develop economic activities with the principal object of satisfying its members' economic and social needs and aspirations, with a democratic structure and running off, in accordance with the principles proclaimed by the International Cooperative Alliance in the terms that results from the present law."*

3.3. Activity

A) What activities a cooperative is allowed to carry out

"Any legal economic activity can be organized and developed by a company formed under this Act" (art. 1.2. LCoop).

B) Specific rules and/or operational, territorial or other restrictions, obligations or obstacles related to the nature of business or to the free exercise of certain activities to be carried out by the national cooperatives, such as insurance activities, participation to public procurements, etc.

In Spanish Law, cooperatives can perform whatever activities they may be up to. But if national law provides for specific rules and/or restrictions related of the business carried out by any company legal form, or for forms of control by a supervisory authority, that law shall apply in full to the cooperative society.

These restrictions:

a) May involve the need to obtain prior authorization for the development of certain economic activities such as:

- Credit activity, which requires prior authorization from the Central Bank of Spain
- Insurance business, which requires approval by the General Directorate of Insurance;
- The activity of international freight transport, special one or shipping, which requires authorization from the Ministry of Work Affairs

b) May include the requirement that certain activities can only be exploited by individuals who act in a particular legal form:

- Credit activity, which can only be developed by public limited-liability companies, cooperatives or savings banks.
- Insurance activity, which can only be developed by public limited-liability companies, cooperatives or mutual insurance companies.

Then: a) the access of the cooperatives to the exercise of certain activities could need the submission to an administrative authorization (credit, insurance, international freight transport); b) the cooperative (and any other company legal form either) is not authorized to take a purpose that is reserved for the "mutual guarantee companies" in our legislation.

Critical Comments

According to art. 8.2 CRSCE, *"If national law provides for specific rules and/or restrictions related to the nature of business carried out by an SCE, or forms of control by a supervisory authority, that law shall apply in full to the SCE".*

As noted in some forums, the provision of art. 8.2 CRSCE confers a wide discretion to Member States in order to identify activities that may be the subject of an SCE established in them. In this way you can not only subject a particular activity to authorization or control the development by SCE but even forbid the SCE access to certain activities. They are therefore deemed as a restriction on freedom of establishment.

However, in our opinion, this circumstance is something usual in the internal context of each legal system and is justified by the permissible state intervention to monitor the exercise of free enterprise, without thereby restricting the freedoms that form the essential content of free enterprise[189].

This criticized view could be valid if, in order to analyze art. 8 CRSCE, we had not taken into account art. 9 CRSCE. If art. 9 is to be considered, this view will no longer be valid. Indeed, by jointly considering arts. 8.2 and 9, we are entitled to state that art. 8.2 aims to

[189] Freedom of movement and establishment of natural and legal persons, free movement of capital and means of payment, free movement of goods and freedom to provide services.

provide the SCE registered in a certain state with the very same treatment enjoyed by national cooperatives when accessing certain activities, such as, asking for an administrative authorization in the field of insurances or credit or the impossibility for an SCE to face some purpose reserve to specific company forms in our Legal system, such as reciprocal guarantee societies.

Thus, the provision is not restrictive on freedom of establishment but respectful for the system of company law proper to each of the Member States.

It would have been more suitable to keep the same draft for art. 8.2 CRSCE, as seen in art. 9.3 CRSE when it states *"if the nature of the business carried out by an SE is regulated by specific provision of national laws, those laws shall apply in full to the SE"*

In short, it does not turn out that national legislators can limit, control or forbid the SCE access to the exercise of certain activities, but the SCE will or will not develop them to the same extent as national cooperatives since the SCE is assimilated (for this purpose) to cooperatives of local law.

C) Dealing with non-members (i.e., depending on the type of cooperative, employ non-members; provide goods and services to non-members; acquire goods and services from non-members)

a) General provision

As a general rule, the LCoop requires express statutory authorization so that the company may enter into transactions with third actors and sets certain limits for such authorization statute (art. 4). Depending on the type of the cooperative, LCoop can establish, however, special rules.

b) Worker-cooperatives

The LCoop provides that *"The number of hours per year performed by contract workers paid to temporary employees may not exceed 30% of total hours per year made by the working partners"* (art. 80.7 LCoop). LCoop does not distinguish between workers with a permanent or temporary relationship, but merely the use of non-associated work. The maximum percentage (30%) refers to the total number of hours worked per year by workers of the cooperative, whether through permanent or temporary contract, and the total number of hours worked per year by working partners.

c) Consumer & user cooperatives

Art. 88.2 LCoop allows activities and services in cooperatives with third parties only if authorized by the Cooperative statutes.

d) Housing cooperatives

The cooperative may sell or lease to both third actors (non-members), business premises and facilities and buildings in addition to their property. The General Assembly will decide the fate of the proceeds from sale or lease thereof (art. 89.4 LCoop)

e) Agrarian cooperatives

LCoop art. 93.4 provides that *"agricultural cooperatives may conduct operations with non-members to a maximum of 50% of those made with the partners for each type of activity undertaken by that."*

f) Community land exploitation cooperatives

LCoop art. 94.2 provides that *"community land exploitation cooperatives can conduct operations with third actors with the limits set for agricultural cooperatives*" (up to 50% of those made with the partners for each type of activity). And the art. LCoop 95.3 states that *"the number of hours per year performed by temporary contract workers may not exceed the limits of the worker cooperatives"* (30% of total hours per year performed by the worker-members)

g) Services cooperatives

Art. 98.3 LCoop supports transactions with third actors up to 50% of the total volume of activity carried out with partners in cooperatives.

h) Marine cooperatives

With regard to transactions with third actors, art. 98.3 LCoop refers to its art. 93 as *"the marine cooperatives can develop operations with non-members up to a maximum of 50% of the total, the partners carried out for each type of activity undertaken by that."*

i) Haulier cooperatives

Art. LCoop 100.2 states that *"Carriers may develop cooperative transactions with third parties where a specific rule enables to do so".*

j) Credit cooperatives

The set of active transactions with third actors of a credit union cannot reach 50% of the total resources of the entity (article 4.2 of the Credit Cooperatives Law).

3.4. Forms and modes of setting up

A) Formation (general way of)

The formation of the cooperative procedure shall be performed by the simultaneous foundation procedure[190], that meaning, with all founders before a solicitor in order to obtain the certification of formation.

B) Formation by merger

A cooperative may be formed by a merger between cooperatives (art. 63.1 LCoop) or between cooperatives and others commercial and/or non-commercial companies (art. 67 LCoop).

[190] You may ask the Registry of Cooperatives the qualification of draft statutes prior to the execution of the deed of constitution (art. 11.2 LCoop).

C) Formation by demerger or corporate split off

A cooperative may be formed:

- By demerger from cooperatives or any others commercial or non-commercial companies that split themselves in two parts or more than two, with the result of two or more than two new legal cooperatives that acquire both memberships and patrimony transferred (art. 68.1 and 5 LCoop).

- Setting up a new legal cooperative fitting inside the demerger parts of other companies (art. 68.1 and 5 LCoop).

- Setting up a new legal cooperative introducing one or more than one patrimonial parts and membership from an alive cooperative, that transfer as a whole of all of its parts to other company - cooperative, in this case (art. 68.2 and 5 LCoop).

D) Formation by conversion

A cooperative may be formed by conversion of any form of company, commercial or not commercial (art. 69.1 LCoop).

"Any association or corporation which is not of cooperative and economic interest groups may be transformed into a cooperative society provided that, where fit, the requirements of sectoral legislation can be met and that the respective members of the latter may assume the position of cooperators in relationship with the objects provided for the company resulting from the transformation"

3.5. Membership

A) Minimum number of members

According to art. 8 Lcoop, *"except in those cases in which this or any other Law establishing minimum first-degree cooperatives should be integrated by, at least, three members. The second degree cooperatives should be formed by at least two cooperatives."*

That means you have to respect the minimum number of partners that is mandated for some types of cooperatives (e.g. credit, that its membership is unlimited - art. 1.3 Credit Cooperatives Law), and the condition of natural or required in legal attention to the kind of union which wants to be a partner (for example, individuals in the case of worker cooperatives, art. LCoop 80).

B) Membership requirements

In first grade cooperatives, art. 1.12 LCoop notes those that can become partners *"according to cooperativize activity, both natural and legal persons, public or private property and communities."* In the second degree cooperatives, cooperatives can be

integrated by partners and other legal entities (public or private) and individual entrepreneurs-only up to 45% of all partners (art. 77.1 LCoop).

C) Membership categories

The LCoop provides the following types of members:

a) fixed-term partners, linked to the cooperative on a temporary basis if so provided in the statutes and whose period of stay is marked at the time of admission (art. 13.6 LCoop).

b) the worker-members, separate category for worker cooperatives, exploitation of community land and schooling and education to involve teachers, staff and services (art. 87 LCoop).

c) working partners, whose participation must be provided for in the statutes. They are allowed in all types except for cooperative partners comprising workers, since their activity is the provision of personal work (art. 13.4 LCoop).

D) If no members other than user-members are allowed

The existence of members-collaborators, not taking straight part in the activities themselves, but helping to reach the cooperative goal, is also allowed[191].

E) If and to what extent investor members are allowed

We distinguish between:

a) *financial members,* holders of voting and labour (or book-entry securities), subject to the rules governing the securities market are present in a minority in the cooperative ventures [192]

b) *Owners* (partners or others) of a subordinate special units with minimum maturity of five years, although repayable at the discretion of the company as a capital reduction because of the restitution of the member-contribution in the Limited Companies Law[193].

F) Indicate the rules on the admission of new members

a) To acquire the status of member requires full subscription of the minimum compulsory contribution and disbursement of at least 25% of it (arts. 13.5 and 46 LCoop), and the entry in the record book and partners the contribution to capital (art. 60.1.ayb LCoop). If you provide the statutes or agreed to by the General Assembly (articles 13.5 and 52 LCoop), the entrance fee must be also paid[194].

[191] The General Assembly determines its legal system. The contribution of the employees can not exceed 45% of total capital and social capital among all partners can not hold more than 30% of the total votes in the bodies (art. 14 LCoop).

[192] Cooperative mode in which the capital is represented by certificates or book entries and where there are two types of partners, financiers, they cannot have more than 49% of the votes allocated on the basis of social capital contributed, and cooperators, holders of 51% of the vote (art. 107 LCoop).

[193] Arts. 80-81 LSRL. If the maturity date is delayed until the adoption of the liquidation of the cooperative, such shares comprising the share capital (art. 53 LCoop).

[194] Which may not exceed 25% of the mandatory minimum contribution for membership.

But in order to become a member is not enough to apply for admission. The cooperative has to accept that application. Administrators are the ones deciding on this issue (art. 13.1 LCoop) by providing just causes for non-admission. Some of these are reasons that derive exclusively from the requirements imposed by law for each class member as cooperative (LCoop arts. 80-104), while others are estimates of the Articles of Association (art. 12 LCoop) in response to self-interest social.

3.6. Financial profiles

A) Minimum capital requirement for the establishment of a cooperative

The LCoop does not set a legal minimum capital figure and refers the matter to the Statutes (art. 11.1.f LCoop).

Most cooperative regional laws, however, establish a minimum capital ranging generally between 3.000 € and 6.000 €.

B) If the capital is variable or not

The social capital of the cooperative is variable, therefore it does not require, in principle, modification of statutes in order to increase or reduce it..

However, statutes will be amended if the reduction concerns the amount of minimum capital in them (art. 45.8 LCoop):

- Refund of contributions in cases where a member leaves (Articles 45.8.1 ° and 70.1.d).
- For allocation of losses to the partner (Articles 45.8.1 ° 59.2.cy LCoop 3.a).
- When the book equity decreases as a result of losses below the amount of minimum capital stated in the articles (art. 45.8.3 LCoop-4th).

C) Rules on the allocation of profits and devolution of assets

a) Previously

In Spanish national cooperative law, profit & loss statement of the financial year must be classified bearing in mind the operations they stemmed from:

- Cooperatives profits & loss:

* Those that stemmed from the cooperative activity with members.

* The income from investments in cooperative entities, or non-cooperative but preparatory activities, supplementary or subordinate to that of the cooperative (art. 57.3.a LCoop).

* capital gains on disposal of tangible fixed assets under certain conditions (art. 57.3.b LCoop).

.- Extra-Cooperatives profits & loss:

* those resulting from transactions with third parties in cooperatives,

* those from investments or shares in non-cooperative entities,

* those from conducting activities outside the cooperative purposes (art. 57.3 LCoop)

* The part of the cooperative outcome of the percentage of votes of the holders and labour for capital injection (Seventh Final Additional Provision on LCoop).

.- Special profits & loss: those that stemmed from the intangible assets' added value (art. 57.3 *in fine* LCoop)

b) Allocation of profits & loss

i) Profits

- In Spanish national cooperative law, there are two different expressions to nominate the financial year profit:

* The profit is designated *"surplus"* when it stemmed from cooperative profit

* The profit is designated *"net income"* when it stemmed from extra-cooperative or from special profits

- However, these expressions may be used only after deduction (from the profit):

* expenses (art. 57.2 LCoop) and loss, even from previous financial years (arts. 57.3 *in fine* y 58.1 y 2 LCoop)

* the allocation to the compulsory funds (compulsory reserve fund; education and promotion fund, statutory compulsory fund) –arts. 55, 58 y 79 LCoop)

* the corporate income tax (art. 58.1 y 3 LCoop)

- Surplus and/or net incomes (the profits available for distribution) will be allocated in order and proportions laid down in the statutes or by a general meeting decision/agreement; for instance (art. 58.3-5 LCoop):

* cooperative return/dividend (retorno cooperativo)

* allocation to voluntary or compulsory funds

* employee compensation

ii) Loss

The cooperative may offset financial losses to:

- to a special account for its depreciation against future positive results within a maximum period of seven years (art. 59.1 LCoop);

- a volunteer reserve funds (art. 59.2.a LCoop)

- The Mandatory Reserve Fund, depending on the origin of the losses, the average percentages for the same in the last five years or since its establishment (art. 59.2.b LCoop).

If the cooperative does not have these resources to cover the losses, they are charged to members in proportion to the activity or committed-real cooperativize of results, if being greater than that. The partner has the right to choose how to enforce this obligation (59.2.c LCoop).

c) Devolution of assets

Loss of membership shall entitle the member to refund his/her part of the assets.

- If membership is lost upon resignation or upon expulsion, the refunding of assets shall be reduced only in proportion to any losses.

- If membership is lost upon resignation but it is because the member has not respected the minimum permanence period laid down by statutes, the refund of assets shall be reduced not only in proportion to any losses; the amount of the liquidation member quote shall be reduced to 30% as maximum.

The amounts shall be calculated by reference to the balance sheet for the financial year in which the entitlement to repayment arose.

The time within the repayment shall be made cannot exceed five years since the loss of membership if it is upon resignation or expulsion, or one year if the loss of membership is upon death. In the meantime, the amount without repayment shall acquire the legal rate of interest.

Each year, the cooperative shall be obliged to pay to every ex-member the fifth part of his/her repayment and the interest receivable from this year (art. 51 LCoop).

D) If and to what extent a cooperative can distribute interest or dividend (i.e., share remuneration) to members

The paid out assets may be compensated/rewarded with an interest rate of 6%, but never superior to the legal money rate of interest.

- The Statutes shall lay down the compulsory assets compensation/reward.

- The General meeting (or the administrative organ, if the statues admit it) shall lay down the voluntary assets compensation/reward.

The assets will be compensated (with the rate of interest referred below) only if there are profits in the financial year before the distribution.

The whole financial year profits are the limit to the compensation/reward (arst. 47 and 48 LCoop).

E) The treatment of patronage refunds (i.e., user-member ex post remuneration); whether compulsory reserves are provided for by law and, if so, how reserves are regulated, especially with regard to their use and distribution to members

a) Compulsory Funds (reserves)

i) Compulsory Reserve Fund (art. 55 LCoop):

- Members leaving the cooperative shall have no claim against the sums thus allocated to the compulsory reserve fund. The exception is on second degree cooperative (art. 77.4 LCoop).

- Amounts that shape the Compulsory Reserve Fund (art. 55.1 LCoop):

* the legal percentages laid out from surplus and/or net incomes

* the amounts deducted from member asset repayment when he/she has not respected the minimum permanence period laid down by statutes

* entrance fees,
* results of inter-cooperative agreements.

ii) Education and Promotion Fund (art. 56 LCoop):

- It cannot be dealt out nor be subject of seizure of property.
- Their resources are as liabilities in the balance with separation of other items.
- The fund must be used for the purposes on art. 56.1; In order to do so, it can work with other entities (art. 56.2);
- Resources coming from cooperative surplus percentages and economic sanctions to partners.
- The management report must include the application into the fund. The amount not used or committed must result in savings accounts, government bonds or autonomous communities and their yields are applied at the same end. Such deposits cannot be pledged or assigned to loans or credit accounts.

iii) Whatever other compulsory funds that legal provisions may ask for depending on their activity (art. 55.2)

b) Voluntary funds:

i) An Indivisible Volunteer Reserve that can be created in cooperatives classified as nonprofit entities: where allocating the positive results, not affecting funds (art. 57.5); where charging all losses.

ii) Volunteer Reserve Funds allocated, created by a provision of the statute or agreement of General Assembly (art. 75.c)

F) Distribution of assets and reserves in case of dissolution (if assets and reserves can be assigned to members or must be allocated otherwise)

The following ones are the rules contained in art. 75.2 LCoop:

a) First: Amounts that are part of the Education and Promotion Fund shall be assigned/allocated:

- A federation of cooperatives to which the cooperative is affiliated
- In its absence, the federation of unions designated by the General Assembly;
- In its absence, the state federation of cooperatives according to the type of cooperative the cooperative is in liquidation;
- In the absence of such a confederation, the State Treasury to the fund for promotion of cooperation.

b) Second: Assets shall be assigned/allocated:

- First to collaborator-partners.
- Secondly, to holders of volunteer contributions.
- In the third place, to holders of compulsory contributions.

c) Third: Amounts to the voluntary distributed reserve shall be distributed to the members:

- in attention to the statutory laid down, if statutes provide this, or
- in attention to the cooperative activity carried out by each member during the last five years, or if this time is less than five years, in attention to the cooperative activity carried out for the member until the cooperative formation.

d) Fourth: The liquid available amount for distribution may be allocated to:

- a certain cooperative association previously stated in the Statutes or designated by the General Assembly,
- a certain federation previously stated in the Statutes or designated by the General Assembly,
- In their absence, the state federation of cooperatives according to the type of cooperative
- In the absence of such a confederation, the State Treasury to the fund for promotion of cooperation.

e) Fifth: Exceptionally, if one member is to acquire membership at another cooperative, the liquidation cooperative shall distribute to this member his/her proportional part in the liquid available amount. The cooperative that admits the new member must allocate the amount into its compulsory reserve fund.

G) Whether a cooperative may issue financial instruments

a) Special Shares (art. 53 LCoop):

The statutes may provide the possibility to acquire financial resources from members or from non-members. These resources have the character of subordinated liabilities. The cooperative shall not be obliged to make a restoration less than five years after the subscription.

When the time within restoration shall be made could last until the cooperative liquidation, the special shares will be considered capital of the cooperative.

In any event, the special shares could be redeemed, if the cooperative consider so, by the procedure to reduce share capital laid down on the “limited company law” (LSRL) to the case of member part repayment (arts. 80-81 LSRL)[195].

b) Other financial instruments by General meeting pass resolution (art. 54.1 y 2 LCoop):

- Bond Issue
- Voluntary Financing subscribed by members or by non-members (in the case of share serial issue)
- Securities other than shares Issue

c) Participation Account Agreement (or Silent Partnership) (art. 54.3 LCoop).

[195] The limited company (SRL) is a type of company different from public limited-liability company (SA), but they both (SRL & SA) are capital companies in Spanish law.

H) Whether a cooperative is obliged to provide public financial statements and balance sheets and, if so, to deposit them and where (for example, at chambers of commerce):

The cooperative must do the books in a proper, organised manner and in the best possible way to its activity according to the (Spanish) Commercial Code and the accounting and accounted rules.

The administrative organ shall draw up the annual accounts and the annual (management) report. The administrative organ shall prepare the surplus/net incomes allocation proposal and also the loss allocation.

The administrative organ shall deposit the above mentioned documents (and the audit report, if applicable) on the Cooperative Registrar of the cooperative registered office. Credit and Insurance Cooperatives must also deposit their annual accounts on the Company Register of their registered offices.

For further information, see arts. 61-62 LCoop.

The cooperative could draw up its annual accounts in the abridged model in accordance with the provisions and circumstances provided under the (Spanish) public limited-liability company law (art. 202 LSA). In this case, the annual management report will not be compulsory.

3.7. Organisational profiles

A) General meeting

a) Competence

The General Assembly has exclusive competency over the matters identified in the art. LCoop 2.21 and residual of those who does not consider LCoop exclusive jurisdiction of another body.

The Assembly may also instruct the board of directors or subject to authorization decisions or agreements, except as otherwise provided in the Statutes (art. 21.1 in fine).

b) Voting rights

i) Each member of a cooperative shall have one vote (general rule).

ii) The statutes may provide for a member to have a number of votes determined by his/her participation in the cooperative activity[196]. This attribution shall not exceed one third of total voting rights per member. The total voting rights shall not exceed half of the number of members (art. 26.2 LCoop). This possibility is only to members which are

[196] The exceptions to this are the so-called cooperative ventures, in which financial partners can be assigned based on votes of share capital without the assembly of which can have more than 49% of the votes society (art. 107). And credit cooperatives in which the weighted vote is expected in view of the contributions to social capital, cooperativize activity or the number of members of each partner institution (art. 9.2 LCCR), not that each partner can have more 20% of the total votes, if a juridical person, or more than 2.5%, if a natural person. Among all non-cooperative partners legal persons may not have more than 50% of the total votes (LCCR art. 7.3).

cooperatives, companies controlled by cooperatives, or public entities. However, this possibility can be statutorily established to all cooperative members in case of agrarian; services; hauliers; marine; and community land exploitation cooperatives (art. 26.4 and 5 LCoop).

In second-degree cooperatives (art. 26.6 LCoop) the vote can be also attributed focusing on the number of partners at base institutions, imposing a cap on non-cooperative 40% of the vote social [with which intended to prevent concentration of power in non-cooperative], and in general, one vote per member limit that varies depending on the number of components of the entity[197].

The member may waive, for a specific Assembly or for a sole votation, to exercise their voting right in a proportional way by submitting just one vote (art. 26.7 LCoop).

The statute shall regulate the cases in which equal voting is mandatory (art. 26.7 Lcoop).

iii) Moreover, in cooperatives having different modes of governing partners, in addition, the criterion of the vote is split, i.e. the possibility of attributing to each partner fractional votes if necessary in order to meet the limit by category feedback partner imposed by LCoop[198].

c) Conflict of interests

The statutes have to establish the circumstances in which the member must refrain from voting because of conflict of interest. The statutes must include the alleged conflict between those under the Limited Companies Law (art. 26.8 LCoop).

The problem is that not all the cases provided for in art. 52 LSRL can be applied to the cooperative. For example:

- The abstention of members is no longer applicable when before the case of an agreement to authorize them to transmit the shares held by them, because this system does not apply in the cooperative;

- The abstention of members is no longer applicable if dealing with the case of the agreement to be excluded from society, because that decision lies with the Governing Council/Advisory Board.

In other cases, the assumptions on art. 52 LSRL need to adapt to the special regulation of the cooperative. For example, the agreement to release the member of an obligation or granted a right (which in any case, may be dealt with legally established), or the agreement by which the company decides to anticipate the partner funds, grant loans or loans, loan guarantees for or provide financial assistance as well as the agreement regarding the waiver of the prohibition of competition if the partner is an administrator, or

[197] No more than one third of the total votes, or 40% if there are only three participants, requiring unanimity if the entity at the second level is composed by only two cooperatives (art. 26.6 LCoop).

[198] Thus, for example, among all the partners can not have more than 30% of the total votes in the bodies (art. 14 LCoop) and financial partners of cooperative ventures can not hold more than 49% of total Feedback-allocated, on an exclusive or preferential in terms of share capital (art. 107 LCoop).

introduction to society of an embodiment of provision of any works or services (except themselves cooperativize activity).

d) Arbitration

In terms of social arrangements, it is possible to submit a claim to revoke the General Assembly and to challenge their agreements to arbitration. The arbitrator may not rule on points which are outside the parties competence (Tenth Additional Provision LCoop).

B) Administrative organ (one-tier system)

The general rule is that there is a Governing Council/Advisory Board, but admits the figure of the *sole administrator,* which will have to be a member at the cooperative with fewer than ten members if the statutes so provide (Article 32.1.2 º LCoop).

The so-called *Organicism is supported by third parties,* i.e. the possibility for persons outside the company to integrate the Governing Council if previously foreseen by the Statutes (art. 34.2 LCoop). It is required for this statutory provision in such circumstances and that such third parties are "qualified persons and experts." The third parties shall not take the positions of President or Vice President and will only have one third of total positions of the Governing Council (Article 34.2 LCoop).

The office administrator has a duration of between 3 and 6 years with the possibility of indefinite re-election (art. 35.1 LCoop).

The maximum number of directors is 15 (art. 33 LCoop).

The LCoop provides *arbitration* for disagreements that may arise both from the Governing Council and the people holding a power of attorney, as the challenge of guiding arrangements (Tenth Additional Provision LCoop).

C) Other organs of the cooperative structure

a) Compulsory organs:

i) Speakers: control organ of the cooperative

ii) Auditors: Where the company is required to be audited (art. 39.1 and 62 LCoop).

iii) Liquidators: body necessary in case of dissolution after opening the liquidation period (art. 71 LCoop)

b) Facultative organs:

i) Appeals Committee (art. 44 LCoop)

ii) Other instances of consultative or advisory governing statutes, provided that their functions are not confused with those of the bodies (art. 19 in fine LCoop).

3.8. Registration and control

A) Registration

Every cooperative shall be registered in the Cooperative Registrar designated in the cooperative law. Thanks to this Registry the cooperative becomes a legal person (art. 7 Lcoop: see also, art. 109 LCoop).

Credit Cooperatives and Insurance Cooperatives have to be registered also at Company Registrar.

B) Control

When it comes to control, it can be distinguished between rules aimed at promoting and encouraging cooperative societies and standards of inspection and sanction.

a) Promotion of Cooperatives

LCoop recognizes as a public interest task to promote cooperativism, encouragement and development of cooperative societies and their economic and representative integration structures (art. 107.1 Lcoop).

The fifth additional provision on LCoop expressly foresees a range of measures to foster and promote cooperatives:

- Incentives and benefits applicable in principle to all types of cooperatives (the consideration of wholesalers, regardless of tax status, etc).

- Incentives and benefits applicable only to one kind of cooperative (the preferential right in case of a tie in tenders and auctions recognized in favour of worker cooperatives, the possibility of acquiring land for public management system provided for the direct award housing cooperatives, etc...)

In no case should be understood this catalogue of incentives or benefits under this particular article as a closed list, because the legislature is free to establish any other means for promoting cooperativism and to modify, extend or abolish what is already established, if it understands it as inappropriate, ineffective, inadequate or excessive, as appropriate.

b) Inspection and sanction rules

By the inspection it aims to monitor and review the activities of the cooperatives to verify compliance and detect any problems, dysfunction or abnormality.

By this sanction, it is intended, when finding a breach of the regulations of cooperatives, to punish the offender. Note that violations are not always related to the measures to promote cooperatives. Such is the case of offenses of not convening the Annual General Meeting on time and not enrolling in the Registry of Cooperative Societies Acts of compulsory registration or stoppage of the governing bodies for two years, to name only some examples.

The infringement is part of the cooperative liability, but this does not prevent other types of personal responsibility required of Members of the Board, auditors and liquidators.

The law distinguishes between serious offenses, serious and minor, establishing economic content including sanctions directly linked to their importance.

In cases of very serious violations that cause or may cause significant economic or social harm involving repeated and essential violation of cooperative principles, sanctions for disqualification of the cooperative may be imposed[199].

The LCoop did not foresee the potential time intervention of the cooperative when a part of her is threatened by interests of third parties or partners.

3.9. Transformation and conversion

Foreword:

1º.- In Spain, the transformation of the cooperative is governed by both the State Law of Cooperatives (LCoop) as well as the regional ones. This report will consider only state law, even if making seldom references to regional laws.

2º.- It is very important to take into account Law 3/2009, as of 3 April, on structural modifications of commercial companies (LME), as its art. 2 expressly excluded from regulation *"structural changes in the cooperative societies and the international transfer of his home*" which *"shall be governed by specific statutory scheme".* We also have the framework of the standard *"cross-border mergers involving a cooperative society"* (art. 56.1 LME) falling outside this.

3º. The Scientific Committee can ask me for further information

A) Indicate whether a cooperative can be transformed or converted into a different legal form of enterprise

a) In National cooperative legislation

The LCoop allows cooperatives to transform into civil or commercial companies of any kind, without affecting the legal status of the converted entity (art. 69.1 in fine).

b) The cooperative regional legislation

Most regional legislation allowed the possibility of transforming a cooperative in civil or commercial company of any kind, although in some cases, the transformation is conditioned by the existence of an objective reason justifying[200]; to be authorized by a body external to the cooperative that is made in accordance with the rules governing the company resulting from the transformation or to the transformation is not prohibited, or expressly excluded by the law applicable to social form is processed.

[199] This measure is not always punitive in nature as it can be adopted, too, outside of a disciplinary procedure will be lost when the requirements for qualifying as a cooperative society.

[200] Only if the cooperative legal system becomes unable to articulate solutions and to meet the business needs of the companies it regulates, the law allows the conversion of a cooperative, which undermines the credibility of the system itself, which allows the output of their societies in search of viable solutions under other social forms.

B) Indicate which rules govern the procedure

The procedure and requirements to be observed by a cooperative for processing are not directly regulated in LCoop [201].

The LCoop deals to protect the interests of members and creditors and to enforce respect for the destination of the non-distributed funds. But all the circumstances of the agreement and the necessary transformation to the registration of the company resulting in the Company Register (or cancellation of seats if the processing cooperative operating in civil society) refer to the terms and conditions set out in law or statutes to the merger (art. 69.2 LCoop.) This makes necessary the use of analogy to fill gaps.

C) Indicate when transformation is not allowed

There is a subjective limitation (both to regional cooperatives and state ones) to the possibility of transforming a cooperative society in the field of insurance business purpose and creditworthiness.

a) In the insurance sector:

The transformation of cooperative insurance in the entities that signals the art. 23.1 of Law on Administration and Supervision of Private Insurance *is valid.* This would include cases of cooperatives variable premium mutual or fixed premium cooperative, and cooperatives at a fixed or variable insurance corporations.

It *is forbidden* to transform fixed premium cooperatives into variable premium ones; or fixed, variable premium cooperatives into fixed premium mutual insurance companies, respectively.

b) In the sector of credit

The transformation of a credit cooperative is *only valid* if it is transformed into public limited-liability company/joint-stock bank (DA.4 ª RD 1245/1995).

D) Indicate how the decision must be taken by members, whether unanimity or a majority decision is required; etc.

a) Competition and conditions of the transformation

The processing agreement is the responsibility of the General Assembly (art. 69.2, 64.1, 21.2.f) LCoop).

The agreement was adopted by a majority of two third parts of the present and represented votes (arts. 64.1, 28.2 and 69.2 LCoop), unless the statutes of the cooperative require a greater majority (art. 28.3 LCoop).

The agreement of transformation in a society in which members are considered personally liable for corporate debts, is effective only for those members who have voted for the agreement (art. 69.2 LCoop in fine).

b) Notifying the agreement

[201] The LCoop devotes more attention to the circumstances of the transformation of other cooperative societies than in the transformation of a cooperative.

Once adopted, the agreement of conversion shall be published in the Official Gazette and in a newspaper of wide circulation in the province of the registered office (Art. 64.2 ex art. LCoop 69.2).

c) Public notice

It will be necessary in any case, to formalize the agreement in public deeds and it will be the company (its representative) who grants the document.

However, if as a result of the transformation, members become personally liable for the debts of the company resulting from the processing, Public deeds must be given jointly by society and by the members facing personal liability.

d) Registration

The transformation of the cooperative society in a social structure having access to the Companies Registrar enables a change in the Cooperatives registrar in which the cooperative was registered, requiring the Registrar to literally transcribe the contents of the certificate of registry Cooperative.

If the company resulting from the transformation is a civil society, as it is not subject to registration, it is up to the Cooperatives Registrar to qualify throughout the procedure and extend the seat of cancellation on the sheet of the cooperative, to be removed from public documents.

e) Publicity of the transformation

If the arising company must be registered in the Companies Register, the transformation is to be published in the Official Gazette of the Companies Registrar.

As far as the transformation of a cooperative into a civil society goes, the Lcoop does not provide any public notifying system.

3.10. Specific tax treatment

A) General Tax Treatment Protection

Law 20/1990 of 19 December on the Taxation of Cooperatives (LRFC) provides in art. 6 the conditions to be fulfilled by a cooperative to qualify as a "tax protected", and in art. 13 lists the reasons why the cooperative loses that status.

In fact, the fulfilment from each cooperative with the requirements imposed by the substantive law in each and every one of the issues raised by the tax law and allows it to achieve protected status.

B) Special Tax Treatment Protection

Certain kinds of cooperative (work associated agricultural community land exploitation, maritime, consumers and users) and second-degree cooperatives, can enjoy special protection (LRFC arts.7-12).

This cooperative has to explicitly include in their statutes the requirements established by the LRFC for special protection.

3.11. Existing draft proposing new legislation

A) Legislative proposals launched

a) Project of Law on SCE established in Spain

b) Proposal of Law for the Promotion of Social Economy

c) Proposed Comprehensive Plan Adjustment of Accounting for Cooperative Societies

B) Legislative proposals needed

a) Need to regulate the structural changes in the cooperative societies

Law 3/2009, as of 3rd April, on structural modifications of commercial companies (LME) are expressly excluded from regulation "structural changes in the cooperative societies and the international transfer of his home" which "shall be governed by specific statutory scheme" (art. 2). Also fall outside the framework of the standard "cross-border mergers involving a cooperative society" (art. 56.1 LME).

These exclusions are of great relevance, especially since the explanatory memorandum accompanying the Act states that *"it is a commercial general rule on structural changes in societies and, in general commercial law, applicable to any society of this nature, Regardless of the form or the social type (...) although the legal regime (...) is the underlying model of limited liability companies*[202]*".*

Perhaps the legislature did not become aware that the "specific statutory scheme" of the cooperative society did not take care of international registered address transfer, or that deals with cross-border mergers involving a cooperative society[203], basically for two obvious and inexorably linked reasons: 1º) because the competition on cooperatives lays exclusively on the Autonomous Regions, 2º) because the autonomous laws of cooperatives cannot regulate such matters, constitutional reservation to the State under art. 149.1.6 º Spanish Constitution. Without forgetting that the LCoop. makes no reference to these specific aspects.

b) Need for Tax Law adapted to the realities of the XXI century

A tax law enacted 20 years ago (Law 20/1990) is not matched by economic or legal reality today, which requires the urgent reform and adjustment. The tax concession scheme for small and medium enterprises may, in many cases, make it more attractive for cooperatives than their own particular tax system.

[202] Article 2 Act 3 / 2009: "This Act applies to all companies that are classified as commercial or by the nature of their subject, either by way of its constitution."

[203] The traditional structural changes (merger, division and transformation) are regulated by regional laws and the state.

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4. The SCE Regulation and national law on cooperatives

After the examination of the **“**Project of Law on the SCE which has its registered office in Spain”, it can be inferred that the implementation would not alter the content of the incumbent. It would only mean a new draft for a more specific act on the SCE, which would supplement the provisions in the Council Regulation, thus only facing all of those questions not foreseen in the Spanish cooperatives Legal system.

ANNEX I
SPANISH LEGISLATION ON CO-OPERATIVES
Spanish/English title format

I. NATIONAL/STATAL LEVEL	
1. General Law	
Ley 27/1999, de 16 de julio, de Cooperativas. (BOE núm. 170 de 17/5/1999)	Spanish Overall Law 27/99 on Cooperatives. Passed on July 16th, 1999. Published on BOE 170, 1999.
2. Special Laws	
Credit	
Ley 13/1989, de 26 de mayo, de Cooperativas de Crédito. (BOE núm. 129 de 31/5/1989)	Law 13/1989 on Credit and Loan Cooperatives. Passed on May 26th, 1989. Published on BOE 129, 1989.
Ley 26/1988, de 29 de julio, sobre disciplina e intervención de las entidades de crédito. (BOE núm. 182 de 30/7/1988)	Law 26/1988, passed on July 29th 1988, on the discipline and intervention of credit bodies. Published on BOE 182, 1988.
Insurance	
Real Decreto Legislativo 6/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley de ordenación y supervisión de los seguros privados. (BOE núm. 267 de 5/11/2004)	Act 6/2004 passing the reformed Law for the order and surveillance of private insurance. Passed on October 29th 2004. Published on BOE 267, 2004
Transport and Hauliers	
Ley 16/1987, de 30 de julio, de Ordenación de Transportes Terrestres. (BOE núm. 182 de 31/7/1987)	Law 16/1987 on Planning and development of Land Transportations and Hauliers. Passed on July 30th 1987. Publisher on BOE 182, 1987.
Housing	
Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación. (BOE núm. 266 de 6/11/1999)	Law 38/1999 of Planning and Development for the Building sector. Passed on November 5th 1999. Published on BOE 266, 1999.
II. REGIONAL LEVEL	
1. General Laws	
Andalucía (Comunidad Autónoma de)	
Ley 2/1999, de 31 de marzo, de Sociedades Cooperativas Andaluzas. (BOJA núm. 46 de 20/4/1999 / BOE núm. 107 de 5/5/1999)	Law 2/1999 of Andalusian Cooperatives. Passed on March 31st 1999. Published on BOJA 46, 1999 and BOE 107, 1999

Aragón (Comunidad Autónoma de)	
Ley 9/1998, de 22 de diciembre, de Cooperativas de Aragón. (BOA núm. 151 de 31/12/1998 / BOE núm. 23 de 27/1/1999)	Law 9/1998 of Aragon Cooperatives. Passed on December 22nd 1998. Published on BOA 151, 1998 and BOE 23, 1999
Asturias (Comunidad Autónoma del Principado de)	
Ley del Principado de Asturias 4/2010, de 29 de junio, de Cooperativas	Law 4/2010 of Asturias Cooperatives. Passed on June 29nd 2010. Published on BOPA 160, 2010
Canarias (Comunidad Autónoma de)	
No hay Ley de cooperativas	There is no such law
Cantabria (Comunidad de)	
No hay Ley de cooperativas	There is no such law
Castilla-La Mancha (Comunidad Autónoma de)	
Ley 20/2002, de 14 de noviembre, de Cooperativas de Castilla La-Mancha. (DOCM núm. 146 de 25 /11/2002 / BOE núm. 301 de 17/12/2002)	Law 20/2002 of Castilla-La Mancha Cooperatives. Passed on November 14th 2002. Published on DOCM 146, 2002 and BOE 301, 2002
Castilla y León (Comunidad Autónoma de)	
Ley 4/2002, de 11 de abril, de Cooperativas de la Comunidad de Castilla y León. (BOCL núm. 79 de 26/4/2002 / BOE núm. 116 de 15/5/2002)	Law 4/2002 of Castilla y León Cooperatives. Passed on April 11th 2002. Published on BOCL 79, 2002 and BOE 116, 2002
Cataluña (Comunidad Autónoma de)	
Ley 18/2002, de 5 de julio, de Cooperativas de Cataluña (DOGC núm. 3679, de 17/7/2002 / BOE núm. 179 de 27/7/2002).	Law 18/2002 of Catalonia Cooperatives. Passed on July 5th 2002. Published on DOGC 3679, 2002 and BOE 179, 2002
Extremadura (Comunidad Autónoma de)	
Ley 2/1998, de 26 de marzo, de Sociedades Cooperativas de Extremadura. (DOE núm. 49 de 2/5/1998 BOE núm. 128 de 29/5/1998)	Law 2/1998 of Extremadura Cooperatives. Passed on March 26th 1998. Published on DOE 49, 1998 and BOE 128, 1998
Galicia (Comunidad Autónoma de)	
Ley 5/1998, de 18 de diciembre, de Cooperativas de Galicia. (DOG núm. 251 de 30/12/1998 / BOE núm. 72 de 25/3/1999)	Law 5/1998 of Galician Cooperatives. Passed on December 18th 1998. Published on DOG 251, 1998 and BOE 72, 1999
Islas Baleares (Comunidad Autónoma de)	
Ley 1/2003, de 20 de marzo, de	Law 1/2003 of Balearic Cooperatives.

Cooperativas de las Illes Balears. (BOIB núm. 42 de 29/3/2003 / BOE núm. 91 de 16/4/2003)	Passed on March 20th 2003. Published on BOIB 42, 2003 and BOE 91, 2003
La Rioja (Comunidad Autónoma de)	
Ley 4/2001, de 2 de julio, de Cooperativas de La Rioja. (BOR núm. 82 de 10/7/2001 / BOE núm. 172 de 19/7/2001)	Law 4/2001 of La Rioja Cooperatives. Passed on July 2nd 2001. Published on BOR 82, 2001 and BOE 172, 2001
Madrid (ComunidadAutónoma de)	
Ley 4/1999, de 30 de marzo, de Cooperativas de la Comunidad de Madrid. (BOCM núm. 87 de 14/5/1999 / BOE núm. 131 de 2/6/1999)	Law 4/1999 of Madrid Cooperatives. Passed on March 30th 1999. Published on BOCM 87, 1999 and BOE 131, 1999
Murcia (Comunidad Autónoma de la Región de)	
Ley 8/2006, de 16 de noviembre, de Sociedades Cooperativas de la Región de Murcia. (BORM núm. 282 de 7/12/2006 / BOE núm. 111 de 9/5/2007)	Law 8/2006 of Murcia Cooperatives. Passed on November 16th 2006. Published on BORM 282, 2006 and BOE 111, 2007
Navarra (Comunidad Foral de)	
Ley Foral 14/2006, de 11 de diciembre, de Cooperativas de Navarra. (BON núm. 149 13/12/2006 / BOE núm. 4 de 4/1/2007)	Provincial Law 14/2006 of Navarra Cooperatives. Passed on December 11th 2006. Published on BON 149, 2006 and BOE 4, 2007
País Vasco (Comunidad Autónoma del)	
Ley 4/1993, de 24 de junio, de Cooperativas de Euskadi. (BOPV núm. 1993135 de 19/7/1993)	Law 4/1993 of Euskadi Cooperatives. Passed on June 24th 1993. Published on BOPV 1993135, 1993
Valencia (Comunidad Autónoma Valenciana)	
Ley 8/2003, de 24 de marzo, de Cooperativas de la Comunidad Valenciana. (DOGV núm. 4468 de 27/3/2003 / BOE núm. 207 de 29/8/1985)	Law 8/2003 of Valencian Cooperatives. Passed on March 24th 2003. Published on DOGV 4468, 2003
2. Special Laws	
Extremadura (Comunidad Autónoma de)	
Ley 8/2006, de 23 de diciembre, de Sociedades *Cooperativas Especiales* de Extremadura. (DOE núm. 153 de 30-12-2006 / BOE núm. 24 de 27/1/2007)	Law 8/2006 of Extremadura Special Cooperatives. Passed on December 23rd 2006. Published on DOE 153, 2006 and BOE 24, 2007
Ley 5/2001, de 10 de mayo, de *Crédito Cooperativo.* (DOE núm. 65 de	Law 5/2001 on Cooperative Credit and Loan. Passed on May 10th 2001. Published on

7-6-2001 / BOE núm. 164 de 10/7/2001)	DOE 65, 2001 and BOE 164, 2001
País Vasco (Comunidad Autónoma del)	
Ley 6/2008, de 25 de junio, de la Sociedad *Cooperativa Pequeña* de Euskadi. (BOPV núm. 2008127 de 4/7/2008)	Law 6/2008 of Euskadi Small Cooperatives. Passed on June 25th 2008. Published on BOPV 2008127, 2008
Decreto 61/2000, de 4 de abril, por el que se regulan las *cooperativas de iniciativa social.* (BOPV núm. 82 de 3/5/2000) Decree 61/2000 regulating Social Initiative Cooperatives. Passed on April 4th 2000. Published on BOPV 82, 2000	Decree 61/2000 regulating Social Initiative Cooperatives. Passed on April 4th 2000. Published on BOPV 82, 2000
III. SPECIFIC TAX LAW	
1. National Level	
Ley 20/1990, de 19 de diciembre, sobre Régimen Fiscal de las Cooperativas. (BOE núm. 304 de 20/12/1990)	Law 20/1990 on Cooperative Tax System. Passed on December 19th, 1990. Published on BOE 304, 1990.
Real Decreto 1345/1992, de 6 de noviembre, por el que se dictan normas para la adaptación de las disposiciones que regulan la tributación sobre el beneficio consolidado a los grupos de sociedades cooperativas. (BOE núm. 292 de 5/12/1992)	Law 1345/1992 enabling rules to adapt current laws to the new tax system for Cooperative groups. Passed on November 6th, 1992. Published on BOE 292, 1992.
2. Regional Level	
Navarra (Comunidad Foral de)	
Ley Foral 9/1994, de 21 de junio, reguladora del régimen fiscal de las cooperativas. (BON núm. 79 de 4/7/1994 / BOE núm. 209 de 1/9/1994)	Provincial law 9/1994, regulating the Cooperatives Tax System. Passed on June 21st, 1994. Published on BON 79 1994 and BOE 209 1994
País Vasco (Comunidad Autónoma de)	
Norma Foral 2/1997, de 22 de mayo, sobre Régimen Fiscal de las cooperativas de Guipúzcoa.	Provincial rule 2/1997 on the Guipúzcoa Cooperatives Tax System. Passed on May 22nd 1997.
Norma Foral 16/1997, de 9 de junio, sobre régimen fiscal de las cooperativas de Álava. (BOTHA núm. 68 de 18/6/1997)	Provincial rule 16/1997 on the Álava Cooperatives Tax System. Passed on June 9th 1997. Published on BOTHA 68, 1997.

Norma Foral 9/1997, de 14 de octubre, del Territorio Histórico de Vizcaya sobre Régimen Fiscal de Cooperativas. (BOB núm. 211 de 3/11/1997)	Provincial rule 9/1997 on the Vizcaya Cooperatives Tax System. Passed on October 14th 1997. Published on BOB 211, 1997.

ANNEX II

SPANISH	ENGLISH
Proyecto de Ley de la Sociedad Cooperativa Europea con domicilio en España	**Project of Law on the European Cooperative Society with its registered office in Spain**

CAPITULO I **Disposiciones generales**	**CHAPTER I** **General provisions**
Artículo 1. Régimen de la sociedad cooperativa europea	**Article 1. Regulating on the European Cooperative Society**
1. Se considera sociedad cooperativa europea (SCE) domiciliada en España aquella cuya administración central y domicilio social se encuentren dentro del territorio español. La sociedad cooperativa europea deberá fijar su domicilio en España cuando su administración central se halle dentro del territorio español. 2. La sociedad cooperativa europea (SCE) domiciliada en España se regirá por lo establecido en el Reglamento (CE) núm. 1435/2003 del Consejo, de 22 de julio de 2003, por las disposiciones de esta Ley y por la Ley de Cooperativas aplicable en función del lugar donde realice principalmente la actividad cooperativizada en los aspectos no regulados por el citado Reglamento, así como por la Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas.	1. It must be considered European cooperative society (SCE)) having its registered office in Spain, that whose head office and registered office are into Spanish territory. The registered office of a European cooperative society shall be located in Spain when the SCE has located his head office in the Spanish territory. 2. The European cooperative society (SCE) having its registered office in Spain shall be governed by both the rules provided in the Council Regulation (EC) no. 1435/2003 of 22 July 2003, the previsions of this Law and by the applicable cooperative law regarding the territory in which the cooperative developed mainly its cooperative activities in case of matters not regulated by the Council Regulation, and by the Law 31/2006, passed on October 18th 2006, on the involvement of employees in a European Company and in a European Cooperative Society.
Artículo 2. Regularización de la sociedad cooperativa europea	**Article 2. European cooperative society regularisation**
1. Cuando una sociedad cooperativa europea domiciliada en España deje de tener su administración central en España deberá regularizar su situación en el plazo de un año, bien restableciendo su	1. When a SCE (of a SCE that has its registered office in 1. When the SCE's head office (of a SCE that has its registered office in Spain) giving up being in Spain, the SCE shall regularize its legal framework in a

administración central en España, bien trasladando su domicilio social al Estado miembro en el que tenga su administración central.	year. The SCE may do that by re-location its head office in Spanish territory or by transferring this to another Member State..
2. Las sociedades cooperativas europeas, que se encuentren en el supuesto descrito en el apartado anterior, que no regularicen su situación en el plazo de un año, se deberán disolver conforme al régimen general previsto en la legislación de Cooperativas que sea de aplicación, pudiendo el Gobierno o el órgano que determine la Comunidad Autónoma competente designar a la persona que se encargue de intervenir y presidir la liquidación y de velar por el cumplimiento de las leyes y de sus estatutos sociales.	2. When the European cooperative societies described in the above paragraph do not regularizes their legal framework in a year, they shall wind-up by the general procedures laid down on the cooperative applicable law. The Spanish Government or the Regional organ appointed by the authorized Autonomous Region, may design the natural person who must inspect, chair the liquidation and watch over the laws' and statutes' enforcement.
Artículo 3. Inscripción y publicación de los actos relativos a la sociedad cooperativa europea	**Article 3. Registered and publication of particulars concerning a European cooperative society**
1. La sociedad cooperativa europea se inscribirá en el Registro Mercantil que corresponda a su domicilio en España.	1. An European cooperative society shall be registered in the Commercial Register in accordance with its registered office.
2. En el Registro Mercantil se depositará el proyecto de constitución de una sociedad cooperativa europea que vaya a tener su domicilio en España.	2. The SCE's formation project shall be delivered to the Commercial Register from the SCE's registered office.
3. La constitución y demás actos inscribibles de una sociedad cooperativa europea que tenga su domicilio en España se inscribirán en el Registro Mercantil conforme a lo dispuesto para las sociedades anónimas. Los actos y datos de una sociedad cooperativa europea con domicilio en España deberán hacerse públicos en los casos y forma previstos en las disposiciones generales aplicables a las sociedades anónimas.	3. Formation and the rest particulars concerning to a European cooperative society that has its registered office in Spain shall be registered in the Commercial Register in accordance with the law applicable to public limited-liability company. Publication of documents and particulars concerning a European cooperative society with its registered office in Spain shall be effected in the event and in the manner laid down in the general provisions to public limited-liability companies law.
4. No se podrá inscribir en el Registro Mercantil una sociedad cooperativa	4. May not be registered in the Commercial Register a european cooperative society

europea que vaya a tener su domicilio en España, cuya denominación sea idéntica a la de otra sociedad española preexistente.	that wants to established its registered office in Spain whose corporate name matches that of pre-existing Spanish society.
5. El Registro Mercantil Central será el órgano competente para expedir las certificaciones negativas de denominación de las sociedades cooperativas europeas previa comprobación de que no existe una sociedad cooperativa con idéntica denominación en el Registro estatal de cooperativas y en los Registros autonómicos correspondientes, los cuáles estarán coordinados con aquél.	5. The Central Commercial Register will be the relevant office in order to issue the suitable denying notifications for SCE´s, after duly checking there is no other cooperative with a matching corporate name registered at both the Central Commercial Register and the correspondent Regional ones, which shall all be coordinated.
Artículo 4. Traslado del domicilio a otro Estado miembro	**Article 4. Transfer of registered office to another Member State**
1. En el caso de que una sociedad cooperativa europea con domicilio en España acuerde su traslado a otro Estado miembro de la Unión Europea:	When a European cooperative society which has its registered office in Spain makes the decision to transfer its registered office to another Member State of the European Union:
a) Los socios que voten en contra del acuerdo de cambio de domicilio podrán separarse de la sociedad en los términos previstos en el artículo 7.5 del Reglamento (CE) 1435/2003.	a) Members voting against the transferring agreement will be able to split from the cooperative within the terms foreseen in art. 7.5 Council Regulation (EC) no. 1435/2003.
b) Los acreedores cuyo crédito haya nacido antes de la fecha de publicación del proyecto de traslado del domicilio social a otro Estado miembro tendrán el derecho de oponerse al traslado en el plazo de dos meses desde la publicación del proyecto, no pudiendo llevarse a efecto el traslado hasta que los créditos queden suficientemente garantizados o satisfechos.	b) Creditors whose rights had been arisen prior to the date of publication of the transfer proposal could opposed to the transfer within two months of the proposal' publication. The transfer of the registered office shall not take effect until the interests of creditors in respect of the SCE have been adequately protected or satisfied.
2. El registrador mercantil del domicilio social, a la vista de los datos obrantes en el Registro y en la escritura pública de traslado del domicilio social presentada, certificará el cumplimiento de los actos y trámites que han de realizarse por la sociedad antes del traslado.	2. The Commercial registrar of the SCE registered office, taking into account the available data located at the register and the presented public instrument to the transfer, shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.

Artículo 5. Oposición al traslado del domicilio a otro Estado miembro.	**Article 5. Opposing the transfer of registered office to another Member State**
1. El traslado de domicilio de una sociedad cooperativa europea registrada en territorio español a otro Estado miembro que suponga un cambio de la legislación aplicable no surtirá efecto si el Gobierno, a propuesta de los Ministerios de Justicia y de Trabajo e Inmigración, o del órgano que determine la Comunidad Autónoma competente, en función de la legislación aplicable, se opone por razones de interés público. Cuando la sociedad cooperativa europea esté sometida a la supervisión de una autoridad de vigilancia, la oposición podrá formularse también por dicha autoridad.	1. The transfer of registered office of an European cooperative society which has its registered office in Spain to another Member State which would result in a change of the applicable law shall not take effect if the Spain Government, taking into account the Justice and Labour and immigration Ministries proposal, or the Government Council from the authorized Autonomous Region, opposes it. Such opposition may be based only on grounds of public interest. When the European cooperative society is overviewed by a supervisory organ, the right to oppose the change of registered office applies to this authority as well.
2. Una vez que tenga por efectuado el depósito, el registrador mercantil, en el plazo de cinco días, comunicará a los órganos citados en el apartado anterior y, en su caso, a la autoridad de vigilancia correspondiente, la presentación del proyecto de traslado de domicilio de una sociedad cooperativa europea.	2. Once the entitling deposit has been made, within the following five days, the Commercial Registrar shall notify to the above mentioned organs/authorities, and to the supervisory organ if need be, the transfer proposal of the SCE registered office.
3. El acuerdo de oposición al traslado de domicilio habrá de formularse dentro del plazo de los dos meses siguientes a la publicación del proyecto de traslado de domicilio. El acuerdo podrá recurrirse ante la autoridad judicial competente.	3. Any denying transfer decision shall have to be taken within two months of the publication of the transfer proposal. Review before the judicial competent authority shall be possible.
CAPITULO II **Constitución por Fusión y Transformación**	**CHAPTER II** **Formation by Merger and by Conversion**
Artículo 6. Nombramiento de experto o expertos independientes que han de informar sobre el proyecto de fusión	**Article 6. Appointment to one or more expert whose shall examine the draft terms of merger**
1. En el supuesto de que una o más sociedades cooperativas españolas participen en la fusión o cuando la sociedad cooperativa europea vaya a fijar su	1. In the event that one or more Spanish cooperative societies ware to be involved in the formation of a European cooperative society by merger or when the European

domicilio en España, uno o varios expertos independientes deberán examinar el proyecto de fusión y establecer un informe escrito destinado a los socios, según lo previsto en el artículo 26 del Reglamento (CE) 1435/2003.	cooperative society is to locate its registered office in Spain, one or more independent experts must study the merger-proyect and draw up a written report as provided for in Article 26 of the Council Regulation (EC) no. 1435/2003.
2. El registrador mercantil será la autoridad competente para, previa petición conjunta de las sociedades que se fusionan, designar a uno varios expertos independientes a que se hace referencia en el apartado anterior.	2. The Commercial registrar will be the relevant office to, upon request from the merging societies, appoint one or several independent experts, as referred in the previous paragraph.
Artículo 7. Derecho de separación de los socios en caso de fusión	**Article 7. Right to resignation/severance for the members case of formation by merger**
Los socios de las sociedades cooperativas españolas que voten en contra del acuerdo de una fusión que implique la constitución de una sociedad cooperativa europea domiciliada en otro Estado miembro podrán separarse de la sociedad conforme a lo dispuesto en la legislación de cooperativas aplicable. Igual derecho tendrán los socios de una sociedad cooperativa española que sea absorbida por una sociedad cooperativa europea domiciliada en otro Estado miembro.	The members of Spanish cooperative societies who opposed the merger decision in the case of merger by the formation of a new European cooperative society with its registered office in other Member State, could be able to resign or separate from the society according to the applicable cooperatives legislation. This very right will also apply to the members of a Spanish cooperative society that is acquired by a European cooperative society with its registered office in other Member State.
Artículo 8. Certificación relativa a la sociedad que se fusiona	**Article 8. Certificate related to the merging society**
1. Las cooperativas españolas participantes en la fusión, una vez otorgada la escritura pública de fusión, y con anterioridad a su presentación en el Registro Mercantil, deberán presentarla al Registro de Cooperativas en el que se encuentren inscritas, a fin de que éste informe al Registro Mercantil, en el plazo de 15 días, sobre la inexistencia de obstáculos para la fusión, procediendo el Registro de Cooperativas correspondiente, en su caso, al cierre provisional de la hoja registral.	1. The merging Spanish cooperative societies may present the public formation document first of all at the Cooperatives Registrar where each one of them is registered. It is because each Cooperative Register, in 15 days, shall sent a report to the Commercial Registrar about the inexistence of obstacles to the merger. Each Cooperative registrar shall close the registry paper provisionally, if it is the case.
2. El Registrador mercantil del domicilio social, a la vista de los datos obrantes en el	2. The Commercial registrar of the SCE registered office, taking into account the

Registro y en la escritura pública de fusión presentada, certificará el cumplimiento por parte de la sociedad cooperativa española que se fusiona de todos los actos y trámites previos a la fusión.	available data located at the register and in the presented public instrument to formation by merger, shall issue a certificate attesting the Spanish merging cooperative society completion of the acts and formalities prior to the merger.
Artículo 9. Inscripción de la sociedad resultante de la fusión	**Article 9. Registered of the society formed by merger**
1. En el caso de que la sociedad cooperativa europea resultante de la fusión fije su domicilio en España, el registrador mercantil controlará la existencia de los certificados de las autoridades competentes de los países en los que tenían su domicilio las sociedades cooperativas extranjeras participantes en la fusión y la legalidad del procedimiento en cuanto a la realización de la fusión y la constitución de la sociedad cooperativa europea.	1. In the event that the european cooperative society formed by merged locate its registered office in Spain, the commercial registrar shall scrutiny the certificates provided by the competent authorities from the countries in which had theirs registered office the foreign merging cooperative societies and the legality of the procedure concerning the completion of the merger and the formation of the european cooperative society.
2. Una vez practicada la inscripción de la fusión, el Registro Mercantil comunicará la misma a los Registros de Cooperativas correspondientes donde se encuentren inscritas las cooperativas domiciliadas en el territorio español que hayan participado en el proceso de fusión para que procedan a su cancelación.	2. The Commercial registrar shall to inform the proper cooperative registrar's where the merging cooperatives -which have their registered office in Spain- are registered, about the merger registry practised in order to cancel the registration of each one of the merging cooperatives
Artículo 10. Transformación de una sociedad cooperativa existente en sociedad cooperativa europea	**Article 10. Conversion of an existing cooperative society into a European cooperative society**
1. En el caso de constitución de una sociedad cooperativa europea mediante la transformación de una sociedad cooperativa española, sus administradores redactarán un proyecto de transformación de acuerdo con lo previsto en el Reglamento (CE) nº 1435/2003 y un informe en el que se explicarán y justificarán los aspectos jurídicos y económicos de la transformación y se indicarán las consecuencias que supondrá para los socios y para los trabajadores la	1. In the event of formation of a european cooperative society by conversion of a Spanish cooperative society its administrative organ shall draw up draft terms of conversion according to the Council Regulation (EC) no. 1435/2003, and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications for members and employees of the adoption of the form of a European cooperative society. The draft terms of conversion shall

adopción de la forma de sociedad cooperativa europea. El proyecto de transformación será depositado en el Registro Mercantil y se publicará conforme a lo establecido en la Ley 3/2009, de 3 de abril sobre modificaciones estructurales de las sociedades mercantiles.	be hended in the Commercial Register and shall be made public as laid down the Law 3/2009, passed on April 3th 2009 about structural changes in the commercial societies.
2. Una vez otorgada la escritura pública de transformación, la cooperativa española que se transforme deberá presentarla al Registro de Cooperativas en el que se encuentre inscrita a fin de que por el mismo se informe al Registro Mercantil sobre la inexistencia de obstáculos para la transformación, procediendo el Registro de Sociedades Cooperativas correspondiente, en su caso, al cierre provisional de la hoja registral.	2. The affected cooperative shall present the conversion registered deed in the Cooperative registrar where it is registered, so that this cooperative registrar inform to the Commercial registrar about the present absence of handicaps to the conversion, and proceeding the proper Cooperative registrar, if it is the case, to provisionally close the registration form.
3. Una vez practicada la inscripción de la transformación, el Registro Mercantil comunicará la misma al Registro de Cooperativas correspondiente donde se encuentre inscrita la cooperativa domiciliada en el territorio español que se haya transformado para que proceda a su cancelación.	3. The Commercial registrar shall to inform to the proper cooperative registrar where the cooperative in question -which has its registered office in Spain- is registered, about the conversion registry practised, in order to cancel the registration of the cooperative in question.
CAPITULO III **De los Órganos sociales** **Sección 1ª. Sistemas de administración**	**CHAPTER III** **Structure of organs** **Section I. Administrative organ system**
Artículo 11. Régimen aplicable a los sistemas de administración	**Article 11. Applicable legal framework for administration systems**
1. La administración de la sociedad cooperativa europea domiciliada en España se rige por lo establecido en el Reglamento (CE) 1435/2003, por las disposiciones de esta Ley, por la Ley de Cooperativas aplicable en función del lugar donde realice principalmente la actividad cooperativizada, así como por la Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y	1. The administration organ for the European cooperative society having its registered office in Spain shall abide by the rules provided in the Council Regulation (EC) no. 1435/2003, by the previsions of this Law, by the applicable cooperative law regarding the territory in which the cooperative mainly develops its cooperative activities, and by the Law 31/2006, passed on October 18th 2006, about the

en las cooperativas europeas, todo ello en los aspectos no regulados por el citado Reglamento.	involvement of employees in a European Company and in a European Cooperative, if all of those rules are not against the Council Regulation (EC) no. 1435/2003.
2. La sociedad cooperativa europea que se domicilie en España podrá optar por un sistema de administración monista o dual, y lo hará constar en sus estatutos.	2. The European cooperative society which has its registered office in Spain may choose between either the one-tier or the two-tier administrative organ system, and must established that choice in its statutes.
Artículo 12. Responsabilidad de los miembros de los órganos de administración Las disposiciones sobre responsabilidad previstas para los administradores de sociedades anónimas se aplicarán a los miembros de los órganos de administración, de dirección y del Consejo de control en el ámbito de sus respectivas funciones.	**Article 12. Liability of the members of the administrative organ** The liability provisions laid down to the members at the administrative organ of the public limited-liability companies shall be applied to the members of the administrative organs, in the field of their respective duties.
Sección 2ª. Sistema monista	**Section 2º. The On-tier system**
Artículo 13. Sistema monista En el caso de que se opte por un sistema monista, existirá un órgano de administración, que será el Consejo Rector de la cooperativa o el órgano de gobierno correspondiente, según la legislación aplicable.	**Article 13. The On-tier system** When opting for a one-tier system, there shall be an Administration organ, which will be the Chair of Management or the correspondent governing body, according to the applicable law.
Sección 2ª. Sistema Dual	**Section II. The two-tier system**
Artículo 14. Órganos del sistema dual En el caso de que se opte por un sistema de administración dual, existirá una dirección y un Consejo de control.	**Article 14. Two-tier administrative organ's** In case a two-tier system is chosen, there shall be a management organ and a supervisory organ.
Artículo 15. Facultades de la dirección 1. La gestión y la representación de la sociedad corresponden a la dirección.	**Article 15. Functions of the management organ** 1. The management organ shall be responsible for managing the society and shall represent it.
2. Cualquier limitación a las facultades de los directores de las sociedades	2. It could not be opposed before third parties any limit to the functions of the

cooperativas europeas, aunque se halle inscrita en el Registro será ineficaz frente a terceros. 3. La titularidad y el ámbito del poder de representación de los directores se regirán conforme a lo dispuesto para los consejeros en la legislación de cooperativas que les sea de aplicación.	managing directors, even if those limits have been registered at the Registrar. 3. The managing director functions property and his representative power space shall be governed by the rules provided to the directors in the applicable cooperative law.
Artículo 16. Modos de organizar la dirección 1. La gestión podrá confiarse, conforme dispongan los solidaria o conjuntamente o a un Consejo de dirección. Cuando la gestión se confíe conjuntamente a más de dos personas, éstas constituirán el consejo de dirección. Los estatutos de la sociedad cooperativa, cuando no determinen el número concreto, establecerán el número máximo y el mínimo, y las reglas para su determinación.	**Article 16. Ways to organize the managing direction** 1. The managing direction could be assigned, as the statutes may provide it, to an unique director, to several directors that could act severally or jointly, or to a Direction Council. In the case that the managing direction had been assigned jointly to more than two people, they will be the Direction council. The exact number of members of the management organ shall be laid down in the statutes. However, statutes may fix a maximum and minimum number and the rules to determining it.
2. Salvo lo dispuesto en el Reglamento (CE) 1435/2003, la organización, funcionamiento y régimen de adopción de acuerdos del Consejo de dirección se regirá por lo establecido en los estatutos sociales y, en su defecto, por lo previsto en la legislación de cooperativas que les sea de aplicación para el Consejo rector de las sociedades cooperativas.	2. Taking into account the provisions of the Council Regulation (CE) 1435/2003, the organization, the running of and the Direction Council resolutions process shall be governed by the SCE statutes and, if no provision is made on it, by the rules provided to the cooperative societies directors in the applicable cooperative law.
Artículo 17. Límite a la cobertura de vacante en la dirección por un miembro del Consejo de control La duración del nombramiento de un miembro del Consejo de control para cubrir una vacante de la dirección, conforme al artículo 37.3 del Reglamento (CE) 1435/2003, no será superior al año.	**Article 17. Time limit applies to a member of the supervisory organ in the event of vacancy in the management organ** As provide the article 37.3 of the Council Regulation (CE) 1435/2003, the supervisory organ may nominate one of its members to exercise the function of member of the management organ in the even of vacancy but not so long than a year.

Artículo 18. Consejo de control 1. Será de aplicación al Consejo de control lo previsto en la legislación de cooperativas correspondiente para el funcionamiento del Consejo rector de las sociedades cooperativas en cuanto no contradiga lo dispuesto en el Reglamento (CE) 1435/2003. 2. Los miembros del Consejo de control serán nombrados y revocados por la asamblea general, sin perjuicio de lo dispuesto en el Reglamento (CE) 1435/2003 y en la Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y en las cooperativas europeas. 3. La representación de la sociedad frente a los miembros de la dirección corresponde al Consejo de control. 4. El Consejo de control, cuando lo estime conveniente, podrá convocar a los miembros de la dirección para que asistan a sus reuniones con voz pero sin voto.	**Article 18. Supervisory organ** 1. The rules provided in the applicable cooperative law about the cooperative societies directors proper functioning shall be applied to the supervisory organ whenever those rules are not contrary off that lay down by the Council Regulation (CE) 1435/2003. 2. The members of the supervisory organ shall be appointed and removed by the general meeting. This shall be applied without prejudice to the provisions established by the Council Regulation (CE) 1435/2003 and by the Law 31/2006, passed on October 18th 2006, about employee involvement in a European Company and in a European Cooperative Society. 3. The supervisory organ shall represent the SCE when dealing with the members from the management organ. 4. The supervisory organ may convene tol the members of the management organ to attend the supervisory organ meeting with the right to speak in debate but without a vote.
Artículo 19. Operaciones sometidas a autorización previa del Consejo de control El Consejo de control podrá acordar que determinadas operaciones de la dirección se sometan a su autorización previa. La falta de autorización previa será inoponible a los terceros, salvo que la sociedad cooperativa pruebe que el tercero hubiera actuado en fraude o con mala fe en perjuicio de la sociedad.	**Article 19. Previously authorised transactions by the Supervisory Organ** The supervisory organ may decide that certain certain transactions from the management direction must be previously authorised. Previous authorization missing could not be opposed to third parties, unless the Cooperative Society proves the third party had acted in fraud of law or to the detriment of social interest.
CAPÍTULO IV **De la disolución** **Artículo 20. Disolución por resolución judicial o de otra autoridad del Estado miembro del domicilio**	**CHAPTER IV** **Winding-up** **Article 20. Winding-up by the court or other competent authority of the Member State where the SCE has its registered office**

La autoridad competente para declarar la disolución en los supuestos previstos en el apartado 1 del artículo 73 del Reglamento (CE) 1435/2003, será el Juez de lo Mercantil del domicilio social de la sociedad cooperativa europea.	The competent authority to order the SCE to be wound up in the cases covered by paragraph 1 from article 73 of the Council Regulation (EC) no. 1435/2003, shall be the Commercial magistrate of the SCE registered office.
Disposición adicional única. Adaptación del Reglamento del Registro Mercantil	**Additional Provision. Abiding by the Commercial Register Regulation**
El Gobierno, en el plazo de un año, procederá a realizar las modificaciones que sean necesarias con objeto de proceder a la adecuación del Reglamento del Registro Mercantil al contenido de la presente Ley.	One year at the latest after the enter into force this law, the Spanish Government shall proceed to make whatever necessary reforms in order to adapt the Commercial Register Regulation to the present law.
Disposición final primera. Título competencial	**First Final Provision. Competence assignment**
Esta Ley se dicta al amparo de la competencia exclusiva que el artículo 149.1.6ª de la Constitución atribuye al Estado en materia de legislación mercantil.	This Act is decreed following the exclusive competence that article 149.1.6º of Spanish Constitution attributes to the State concerning to Commercial legislation.
Disposición final segunda. Habilitación al Gobierno	**Second Final Provisión. Enabling instruments for the Government**
Se faculta al Gobierno para dictar cuantas disposiciones sean necesarias para la aplicación y desarrollo de la presente Ley en el ámbito de sus competencias.	Government is authorised to dispatch so many dispositions as needed for the application and development of this law within its faculties.
Disposición final tercera. Entrada en vigor La presente Ley entrará en vigor al mes de su publicación en el “Boletín Oficial del Estado”.	**Third Final Provision. Entry into force** This Regulation shall enter into force on the first month following its publication in the “Spanish Official Diary”

SWEDEN

By Yohanan Stryjan

SUMMARY. 1. General comments. – **2.** Existing SCEs. – **3.** Implementation. – **4.** Overview of national cooperative law. – **4.1.** Sources and legislation features. – **4.2.** Definition and aim of cooperatives. – **4.3.** Forms and modes of setting up; membership. – **4.4.** Auditing. –**4.5.** Registration and control. – **4.6.** Transformation and conversion. – **4.7.** Specific tax treatment. – **4.8.** Cooperative promotion. –**5.** Final comments, recommendations. –**6.** Essential bibliography.

1. General comments

The introduction and implementation of Regulation (EG) 1435/2003 regarding SCE was preceded - by a considerable amount of sectoral consultations and legislative work (as is the rule in the Swedish legislation process- which is discussed in more detail in the section on implementation, below) but interest, amongst the organizations involved was generally low, and the issue never gained significance, or was perceived as an important opportunity by the established cooperative actors.

At present, there is merely one (1) SCE registered in Sweden, *Campus ReDesign SCE*, which started operations in March 2009.

Interviews

The following persons were interviewed in the course of material collection

- Yngve Karlsson, legal consultant to Coompanion Sweden
- Gunn-Britt Mårtensson, former chairperson Housing Coop Federation, current chair Coompanion Sweden
- Jonas Lagneryd, CEO, Campus ReDesign SCE
- Leif Thyrén, Advisor Coompanion Värmland.
- Lena Göransson Norsjö, Bolagsverket
- Hans Lind, Bolagsverket
- Curt Olof Mann, Chief Administrator, Coompanion Sweden

Less structured contacts with officers of the established cooperative federations were also made. Largely, those interviewed fall into three categories, with different roles in the process of legislation and implementation: established cooperation, actors promoting new cooperatives and institutional (administrative) actors.

Established cooperative movements: considered the introduction of the directive a principally positive development, but hardly a significant business opportunity for the organizations concerned. All major cooperative organizations were involved in the remittal process (so called *remissrundan*) but the matter was delegated to legal counsels, and the

depositions (*yttranden*) sent in mostly aimed to safeguard against disruptions in established cooperative legislation and practice. The general feeling seems to be that these organizations' objectives are fully met by existing legislation (that is also more amenable to change, if such a need arises). These organizations' access to the necessary legal and financial resources renders irrelevant the questions of legal complexity and capital requirements as potential hindrances to SCE establishment. The problem is rather that the form lacks competitive advantage, as compared to other solutions.

Actors promoting new cooperatives: The majority of interviews were conducted with this group, consisting of officers of the national federation of cooperative development associations (*Coompanion Sverige*) and their legal adviser, local cooperative consultants that assisted in the formation of Sweden's sole SCE, and the SCE itself. Coompanion Sverige was actively involved in the legislative process, and did submit a number of proposals (on national options) whose objective was to strengthen member influence, strengthen the position of the administrative organ in two-tier system SCEs and to codify some elements of Swedish practice. However, none of these were incorporated in the law. The national organization is aware of at least one attempt to start an SCE that was given up due to capital requirements.

Campus ReDesign SCE decision to opt for the SCE form was made quite independently, and received support from Coompanion Värmland, a local constituent of Coompanion- simply as a part of the organization's mandatory task to support new cooperative initiatives. Once committed to the task, it could also mobilize the necessary legal competence. Once formed, the SCE was nominated by Värmland, and elected by Coompanion Sverige as "the cooperative of the year", thus generating the only publicity the SCE form ever received in Sweden. Presently, Coompanion Värmland is working on a handbook for would-be SCE founders, in order to address the lack of experience with the form, which it considers a major (yet potentially remediable) drawback.

Institutional actors: Swedish Companies Registration Office (Bolagsverket), the institutional gate-keeper of the registration process, considers its role as primarily administrative and service oriented, namely managing all separate company registers, of which the SCE is a (rather marginal) one. The authority is not supposed to promote any particular incorporation form. The interest in the SCE form is extremely low and enquiries about the form have been (to quote one of the two respondents) "as scarce as water on the moon".

Thus far, the registering agency *Bolagsverket* has only received, and approved one (1) registration application. The registration procedure proper took 3 months (18 Dec 2008-19 March 2009), following a period of informal contacts. The process of registration was perceived by all parts involved as a largely positive learning process that included a number of formal quandaries in which the registering association had to reformulate portions of the material submitted—but, significantly, the Registration Office also had to revaluate its initial understanding of the law on some technical points. Trivial in

themselves, these illustrate the nature of difficulties that a new and imported legal form encounters:

1. Lack of proper forms: whereas *Bolagsverket* provides appropriate registration blankets for most incorporation forms, no such blankets were shaped for SCE[204]. The registering association simply shaped its own form, by modifying available economic association forms.
2. Whether the company name (firma) of the SCE should end with "limited" The directive requires[205] that "Where the members of the SCE have limited liability, the name of the SCE should end with "limited". In Swedish national (company and association) law, liability limitations are contained in the incorporation form, and no additions are called for. The SCE refused to include this addition, arguing that it would reduce its credibility, since no other company in Sweden is required to have a disclaimer of this sort included in its name. After some discussion, Bolagsverket conceded, requesting instead that the matter be included in the SCEs bylaws.

2. Existing SCEs (Source: the SCE register held by Swedish Companies Registration Office)

There is one (1) registered SCE in Sweden, Campus ReDesign SCE established (founding Assembly) Oct 2008, registered 18 March 2009. All founders are natural persons. At the closing of the accounting year (2009) the cooperative had 14 members and projects a significant increase in the current year (primarily by recruiting customers as members). The capital is €30000 (two thirds of which in pledges, as of Jan 2010). The object of the society is to promote the economic interests of its members by means of providing training based on ecologically and socially sustainable development, and other operations connected and compatible therewith (from Charter). Or, in the words of the annual report: "we develop market and sell training and coaching [services] for ecological and sustainable development via our online service CARD.coop". The intention (as expressed in the Charter) is to expand cooperative membership to customers of Campus' services, and to suppliers (subcontractors).

The first year of operation (March-Dec) was mostly devoted to construction of the necessary (virtual and pedagogical) tools, and preparations for the first 'proper' year of operation. There were no sales and no employees, and the year ended with a minor loss of €6109. Apparently these data provide no indication as to the SCEs future prospects. The case provides a number of interesting insights. First, the cooperative's representative was the only person interviewed that could perceive and point out some comparative

[204]No registration formularies were created for European companies either, so that this omission cannot be seen as biased against this particular form.
[205]Art 1 2§ mom2. The Swedish version stipulates the cumbersome "förening med begränsad ansvar"

advantages of the SCE form. Secondly, two of these advantages were quite unconventional, by Swedish standards, namely:
a. the availability of a dual governance structure (otherwise not endorsed by Swedish legislation), judged by the founders as highly suitable for the multi-stakeholder organization envisaged.
b. Higher flexibility as regards non-EU members: an important quality for a born-global consulting enterprise; a not quite intended aspect of the legislation.
Predictions from a single, not quite developed case are premature. One possible scenario may be that the new incorporation form will attract just highly innovative, and somewhat unconventional, enterprises: qualities that are all too seldom attributed to established cooperatives.

Plans to set up an SCE: 0

One group of prospective SCE founders backed out, finding the capital threshold too high.

Negative drivers or dissuasive factors (according to the national expert):
Generally, I doubt that the reasons for the form's weak performance should be sought in "negative drivers"; liability of newness is clearly a new form's most obvious handicap. Unfamiliarity means both higher cost of search for necessary expertise, and lack of confidence among potential creditors and business partners. Such problems are generic for all new types of enterprise. The problem in this case rather lies in the absence of positive drivers: the form lacks a clear advantage over available, established alternatives, and/or examples that encourage emulation.

Beyond that point considerations vary among different groups of prospective founders. Established cooperative organizations do not see any advantage for preferring it over national tools that are well proven, highly flexible and regulated by laws that are more easily amended if such need arises.

New, grass-roots initiatives are primarily deterred by the minimum capital requirements that are exorbitant by Swedish standards.

Still, this group appears most likely to be attracted by new, unconventional possibilities, as the case of Campus ReDesign illustrates.

Negative drivers or dissuasive factors (according to the 7 interviewees):

- lack of knowledge about this legal form (2)
- flexibility of the national coop legislation (4)
- costs of setting-up (3)
- minimum capital requirement (3)
- no particular advantage in using this form (1)
- complexity of the SCE regulation (1)

Positive drivers according to the CEO Campus:

- Value of the European image (1)
- Availability of the two-tier system, which is not available in national law (1)
- More flexibility as to enlistment and equal treatment of members from non EU countries (1)

3. Implementation

The central legal documents in the implementation process are Law 2006:595 om europakooperativ of June 1st 2006 in force since 1 June 2006 (original version) amendments 2008:10; 2009:17 since 15 Feb 2008, 15 July 2009 respectively, supplemented by förordning (Regulation) (2006:922) *om europakooperativ*.

The Law introduces "provisions (bestämmelser) that complement" Regulation (EG) 1435/2003. (§1). It does not address, nor modify the provisions of national cooperative law. The paragraph also contains explicit references to laws on members'-banks and on employee participation. The law-text proper is considerably shorter than the Regulation (40 §§, totalling 9p), and is only a fraction of the 444p proposition presented to Parliament. Another part contains amendments in relevant paragraphs in other laws that apply to economic associations (or list them among the legal subjects to which the law in question applies) to include the SCE incorporation form. The remaining over 300 pages are *förarbeten:* a record of legal deliberations and considerations that in the Swedish tradition is also legally binding (see below).

Regulation (2006:922) *om europakooperativ* removes some ambiguities in the implementation law[206]. Most importantly, it states that the association's bylaws and minutes of the constitutive meeting should be considered equivalent to a foundation act. Regarding own capital, the Swedish legislation sets no lower capital requirements for economic associations. The (EG) regulation defines a clear lower limit for SCE, but does not clearly distinguish between actually deposited and pledged sums. The Swedish regulation (4§ mom 2) clarifies that pledges are sufficient in this respect.

Comment on implementation: The legislative process in Sweden normally starts with a government directive in which a state or departmental commission is called into being to consider legislation on a given topic. The committee (or the investigator, if a "committee of one" is appointed) produces a report (betänkande), published within the SOU (state) or Ds (departmental) series, that is sent on a referral round (remissrunda) to all concerned authorities and organizations that are given time to comment[207]. The final report is then

[206]The EU directive (EG 1435/2003 Art 11 1§) refers to public limited-liability company legislation which, just on this point, is not quite compatible with Swedish Association law: a Swedish association starts it legal existence with a constitutive assembly, and applies for registration with bylaws approved by it. It does not produce a foundation act, and is not expected to present such a document.

[207]In this case: all cooperative central organizations, so-called "popular movement" organizations, business

passed to Government, and a draft law proposal is prepared within the appropriate department. The draft is then passed, for judicial preview to *Lagrådet,* the law council, to control compatibility with existing laws, internal consistency etc, and subsequently presented as a proposition to parliament. This elaborate process deposes an abundant paper trail, whose volume is not necessarily related to the relevance of the issue at hand.

There are a number of important differences between the Swedish legal tradition and that of continental Europe. The historical intertwining of the judicial and the executive branches resulted in a peculiar combination of rather vaguely worded jurisdiction with strict implementation/jurisprudence. In other words, actual implementation of the law-text is not encoded in the letter of the law (nor in the body of legal precedent). Instead, it is largely embedded in the record of legislative deliberations (lagförarbete) that is based, in turn, on the corpus of administrative precedent (rather than on prejudicata), and on the inputs of the consultative referral process (remissförfarandet). In this respect, the law proposition and the law-committee deliberations are also an important component of the law, to be consulted whenever unclear interpretation arises, while courts' leeway in interpreting the law or submitting it to judicial review are relatively limited.

Oversimplifying the matter, the (preferably, but not necessarily documented) *intent of the legislator is treated in parity with the letter of the law*. The import of a legal text originating in a quite different legal tradition poses a set of new demands: references to national legislation in the Regulation's text may make it necessary to codify those elements that were previously a largely non-codified/implicit element of administrative praxis; a challenge that may be met either in the text of the actual law—or by modifications in existing national laws that incorporate established practice into the law-text.

The deliberative process' operation and its legislative outcomes are well illustrated by the discussion concerning legal persons' status in the cooperative's central organs (Regulation, Article 42). Traditionally, board members attend in their capacity as physical persons. Thus, legal persons may *not* be elected, nominated or serve as board members in economic associations. However, this has not previously been explicitly stated in the association law[208]. The government draft states that election of physical persons only is the customary practice (en sedan länge gällande princip) that should be formalized by an (yet untaken) amendment of the association law (Föreningslagen) *without* any provisions in the Law on ECS.

Influence on national cooperative legislation

The law did not lead to substantial modification of national legislation. As noted, the biggest qualitative change is that the existence of cooperative two-tier governance is acknowledged and accepted, but *for this specific cooperative form only*.

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organizations, and the judiciary

[208] The law on joint-stock companies was amended in the course of the legislative process of implementing the European Company Law with a provision that bars legal persons from board membership.

National options

Legislation's treatment of the legal options provided by the Directive is discussed extensively in the proposition (pp 89-165). The central features are presented in tables 1: *Competent Authorities* and table 2: *Legal options*, below. As the example in the previous section illustrates, it is necessary to keep in mind that absence of clear legislation on a given issue needs not necessarily mean that no position was taken. Absence of legislation may also indicate (a) that legislators consider the issue amply covered by existing legislation in such a case, an appropriate indication would be included in the proposition, but not in the law text; (b) that appropriate legislation will, in due time, be introduced in a different law.

Competent authorities: The authority that handles registration, records, change of status etc., envisaged in Article 78 is *Bolagsverket,* Swedish Companies Registration Office. As is the practice with all registered incorporation forms, a separate register was created for SCEs.

Other authorities are competent to intervene or inhibit steps taken by the SCA in specified junctions (table 1).

Table 1: Competent Authorities

PROVISION OF THE SCE REG.	COMPETENT AUTHORITIES
7 – Transfer of registered office	Swedish companies registration office (*Bolagsverket*) (§ 8); Tax authority and Swedish Financial Supervisory Authority *finansinspektionen* (§14)
21 – Opposition to a merger	Tax authority and Swedish Financial Supervisory Authority *finansinspektionen*
29 – Scrutiny of merger procedure	Swedish companies registration office (*Bolagsverket*)
30 – Scrutiny of legality of merger	Swedish companies registration office (*Bolagsverket*)
54 – Convocation of the general meeting	The county administrative board in the location of the SCEs main office , on complaint from directly concerned[209].(36§)
73 – Winding-up	Swedish companies registration office (*Bolagsverket*)

[209]Regarding the authority to convene a general assembly if the board neglected its obligation to do so, or failed to adhere to proper notice procedure. New legislation on economic associations (presently in referral/remittal) proposes to transfer this right to *Bolagsverket*

Table 2: Legal Options

No	SCE REG.	CONTENT OF THE OPTION	IS THE OPTION IMPLEMENTED?	NAT.LAW PROVISION
1	Art. 2, par. 2	to permit that a legal body the head office of which is not in the Community participates in the formation of an SCE	Yes, if formed in a way that conforms to the legislation of a country within the EEC, has its seat in same country as its head office, and has actual and continuing connection to the economy of a EEC country.	Law (2006:595) Entire § 4
2	Art. 6	to oblige the SCE to locate the head office and the registered office in the same place	No special provision. (The legislators' explicit opinion is that the matter should not be regulated (as regards locations within Sweden)	
3	Art. 7, par. 2	to provide additional form of publication for the transfer of the registered office	For SCE other form than notifying known creditors/claimants. A public notice is published by Bolagsverket	§ 17§
4	Art. 7, par. 7, subpar. 1	to provide requirements for the protection of the interests of creditors and holders of other rights in case of transfer	A full list of liabilities and guarantees is submitted to Bolagsverket, that issues a call to all known claimants. A permit to move is issued first after the guarantees were found satisfactory and no claimant opposes the move. In the latter case the issue is proven by a court. Parallel provisions exist in regulation of financial cooperatives	Law (2006:595) §§ 16-19
5	Art. 7, par. 7, subpar. 2	to extend the application of art. 7, par. 7, subpar. 1, to liabilities that arise, or may arise, prior to the transfer	No	
6	Art. 7, par. 14	to prohibit the transfer of the registered office in case of opposition by competent authorities	Yes. The authorities listed are the tax authority and finansinspektionen. (and as mentioned above, a court of law.	§13; Temporary inhibition § 16
7	Art. 11, par. 4, subpar. 2	to entitle the management organ or the administrative organ of the SCE to amend the statutes without any further decision from the general meeting in the case described by art. 11,	Yes	§35

		par. 4, subpar. 1		
8	Art. 12, par. 2	to derogate from the national provisions implementing Directive 89/666/EEC in order to take account of the specific features of cooperative	No. The modification of Filiallagen (1992:160) simply adds SCAs to list of firms to which Swedish legislation applies. Generally, ”Specific features of cooperatives” are not a valid legal consideration in Sw legislation.	Law (1992:160) adding .mom 4 to §13.
9	Art. 21	to prohibit a cooperative to take part in the formation of an SCE by merger in case of opposition by competent authorities	Yes. The Tax Authority and in relevant cases Finansinspektionen (FI) may prohibit fusion only in the case that the SCE has its seat outside Sweden. The legislators consider this as tantamount to removal of a SCEs seat (see above, point 6. A special para is inserted to cover merger of assistance associations (stödföreningar)	§89
10	Art. 28, par. 2	to ensure appropriate protection for members who have opposed the merger	A legal distinction between the overtaking and overtaken parties. A member of the overtaking cooperative has the right to request exit if he voted against the decision and if the seat of the SCE is to be located outside Sweden. The provisions of Art 7.5 of the SCE directive apply. Members of the overtaken association are covered by Swedish Ec Assoc Law	§9
11	Art. 35, par. 7	to condition conversion on a favourable vote of a qualified majority or unanimity in the controlling organ of the cooperative within which employee participation is organised	The governing organs have no special position. Swedish law applies: fusion requires approval by a highly privileged majority (9/10ths) on general assembly, or on 2 consecutive assemblies (2/3 on the second).	
12	Art. 37, par. 1	to provide for the responsibility of the managing director	Yes, Obligatory for SCE that has had 200 employees or more 2 consecutive accounting years . Governing organs control over-	§28 §29, 30
13	Art. 37, par. 2, subpar. 2	to require or permit an SCE statutes to provide for the appointment and removal of the members of the management organ by the general meeting	No	
14	Art. 37, par. 3	to impose a time limit on the period indicated	Yes. Two months	§23

		therein		
15	Art. 37, par. 4	to fix a minimum and/or maximum number of members of the management organ	Yes. Min three	§27
16	Art. 37, par. 5	to adopt appropriate measures for the two-tier system	Yes, in the sense that the form is introduced into legislation. The Swedish rules for the (monistic) board apply to the supervisory organ. No modifications of the directive's guidelines as regards the managing organ are introduced.	
17	Art. 39, par. 4	to stipulate the number of members or a minimum and/or a maximum number or the composition of the supervisory organ	Yes. Min five	§27
18	Art. 40, par. 3	to entitle each member of the supervisory organ to require the management organ to provide information	Yes. Para 29 enlarges that this applies to the information from managing director as well.	§24, §29
19	Art. 42, par. 1	to provide for the responsibility of the managing director	Yes. Mandatory if the number of employees exceeds 200 two consecutive accounting years, or if that was the case in any of the cooperatives that formed it..	§28
20	Art. 42, par. 2	to set a minimum and, where necessary, a maximum number of members of the administrative organ	Minimum of three. No maximum	§27
21	Art. 42, par. 4	to adopt appropriate measures for the one-tier system	The Swedish law on Economic associations is to apply in this case.	§26
22	Art. 47, par. 2, subpar. 2	to limit the power of representation in the event described therein	No. (Considerations provided in Prop. 2005:06/150, 5.24)	
23	Art. 47, par. 4	to provide for the enlargement of statutes capacity to regulate the power of representation	Considered covered by existing regulations and mandatory in statutes.	
24	Art. 48, par. 3	to dictate particular provisions on operations requiring authorisations	The power of decision rests with the supervisory board, if not otherwise set in the statutes Such provisions have to be registered with Bolagsverket.	§22, §34
25	Art. 50,	to dictate particular	No	

	par. 3	provisions on the supervisory organ's quorum and decision-making		
26	Art. 54, par. 1	to provide about the date of the first general meeting after incorporation	No. The issue is covered by existing legislation, that sets more exacting conditions.	
27	Art. 61, par. 3, subpar. 2	to set the minimum level of special quorum requirements indicated therein	No. Swedish legislation does not admit for non-user (supporter or investor) membership, which makes the issue irrelevant. Other quorum requirements are customarily set in statutes.	
28	Art. 68, par. 1	to derogate from the national provisions implementing Directives 78/660/EEC and 83/349/EEC in order to take account of the specific features of cooperative	No	
29	Art. 77, par. 1	to permit the expression of capital in Euro (where the third phase of EMU does not apply)	Yes.	§33
30	Art. 77, par. 2	to permit that accounts are prepared and published in the national currency (where the third phase of EMU does not apply)	Yes. No particular legislation. The general requirement is that accounts have to be set in the same currency as own capital, which makes §33 sufficient.	

4. Overview of national cooperative law

4.1. Sources and legislation features

Strictly speaking, Sweden has no specific "cooperative law", i.e. a law that applies only to cooperatives (however defined), and the term "cooperative" (though well established in the language) does not denote a particular incorporation form/legal subject regulated by legislation[210]. Nonetheless, it is possible to say that virtually all cooperatives are regulated by one law - the law on economic associations (Ekonomiska föreningslagen, EFL SFS

[210]The term was first introduced in the 80s, then as an adjective or qualifier, in the legislation on "kooperativ hyresrätt", a particular tenant cooperative form. Significantly when referring to cooperatives in other countries in the context of setting up a SCE(4§), the legislators resort to the euphemism "a corresponding foreign association" (motsvarande utländsk förening).

1987:667, last amended 1 July 2009)[211]. The law defines an incorporation form in terms that are applicable for, and resorted to, by a broad range of actors—from purely commercial ventures (e.g. freight companies, industrial parks and retail chains) to voluntary associations (that are entirely unregulated in Swedish law[212]). Summing up this somewhat confusing situation: virtually all cooperatives in Sweden (however defined) are legally considered to be “economic associations” (ek. för). Not all economic associations could be considered cooperatives, or would ever like to be considered as such. In keeping with this approach, important cooperative features are not regulated in the law, or proposed as a mainstream rule with the qualifier "unless the bylaws contain a different provision".

Generally, the law defines central areas whose regulation is mandatory. Such regulation can be achieved by legislative detail, by association bylaws, or by some combination of the two. The legal provisions fall into roughly four categories:

a. Imperative provisions that must be followed by all ek. för. In certain cases these have to be written into the bylaws as well.

b. Benchmark provisions that may only be superseded by *more exacting* provisions in the association’s bylaws[213].

c. Optional, that may be wholly replaced by provisions in the association’s bylaws, which have precedence over the law-text. The laws provisions would apply, by default, if not explicitly replaced.

d. Dispositive, designing areas that must be addressed by the bylaws, with no specific options or preferences offered by the legislator.

The term “ekonomisk förening”, is often shortened in the law-text to mere “förening”, literally “association”, a convention that was followed in this report. This shorthand notation is not problematic in the Swedish context, since other association forms are not regulated in Swedish law.

4.2. Definition and aim of cooperatives

Economic associations are defined as follows (1 chap” §1):

An economic association has the goal of advancing the members[214] economic interests through economic activity in which the members participate

1. as consumers or other (category of-) users

[211]Lag (1987:667) om ekonomiska föreningar. Housing cooperatives (bostadsrätt; not to be confused with kooperativ hyresrätt) and financial institutions are regulated by additional legislation.

[212]Generally, the law would be applicable to voluntary associations in the field of governance and membership rights- unless their bylaws explicitly outline different provisions.

[213]The law-text does not explicitly define the meaning of “more exacting”

[214]Verbatim translation. "The members", rather than the intuitively proper expression "its members"' is used, to allow for the case of second-tier cooperatives that serve primary cooperatives *members'* interests, rather than those of the legal persons they associate, as made obvious in a note at the end §1.

2. as suppliers
3. with own work contribution /../ or in other manner."

The key criterion applied is *members' economic interests* that are to be advanced by the shared organization, an approach that is quite incompatible with the European emphasis on *needs* notion of *needs* as a defining criterion (cf SCE directive, Art 1 §3), and on *economic activity* (thus defining away organizations that focus on lobbying and interest articulation). The specifically cooperative features may be introduced by members/founders in the bylaws by such organizations that wish to define *themselves* as cooperatives. The emphasis on economic interest also renders irrelevant the discussion on profit. Thus, in the Swedish legal framework, economic association are, per definition 'for profit' enterprises (and may be denied registration if the bylaws are too strongly non-profit profiled.

The traditionally cooperative elements that the law contains are

1. The concept of membership
2. a principle of openness
3. limited returns to capital

There is no restriction on the type of aim chosen, other than it having a clear economic content, and being declared in the bylaws. An association's field of activity has to be specified in the bylaws, but this declaration does not have to conform with any official branch classification, and broad definitions are the rule (often accompanied with a general clause "and any activity that is in line with the abovementioned"). The law does not recommend any field of economic activity, and does not exclude any particular branch.

It is worth noting that cooperative federations are considered, in a fairly similar manner as associations governed by their members and have no privileged legal standing, beyond what may be agreed in the bylaws.

4.3. Forms and modes of setting up; membership

An economic association is formed by at least 3 persons (natural or legal) that convene a constitutive assembly, approve a set of bylaws and apply for registration within half a year from the constituting assembly(2kap, 3§)[215]. It attains full legal status first from the moment of being entered in the register (1 kap 2§). The emphasis on economic interest in 1§ of the law suggests that most founder members should be realistically expected to participate in the association's envisaged economic activity for the association to be

[215]Or from the moment it commenced operations, if that was explicitly set (in bylaws or by member assembly) at some later date. The application for registration (form 904 http://www.bolagsverket.se/dokument/pdf/blanketter/904.pdf) enumerates all board members, authorized signatories and, in larger associations, the executive officer(s). It has to be accompanied by a copy of the bylaws and a protocol from the constitutive meeting documenting that the bylaws were approved by the assembly).

entered on the register of economic associations.

The law does not stipulate any particular criteria for membership, but requires

a. that the criteria, rights, obligations and admission/exclusion/exit procedures whatever they be are clearly specified in the bylaws.

b. That those that fulfil these criteria should be free to apply for membership (principle of openness).

Setting up the association is a prerequisite for having a set of bylaws approved, and clearly precedes application for registration. The newly constituted association has to submit its bylaws and apply for registration. In the interim period - between application and being entered in the register - the association is free to start operations, but is not protected by a limited liability provision. Liabilities - if such arise during that period - would be borne by the board of directors (1 kap 4§).

Some key elements of the law are presented in table 3 below. Institutional issues (control, auditing, conversion etc.) will be discussed in the following sections.

Table 3 The law on Economic Associations: some key elements

	Type	**Economic associations:** Lag (1987:667) om ekonomiska föreningar
2) Economic activity (restrictions)		No restrictions. Financial and insurance institutions are regulated in their operations and auditing by appropriate sector legislation. Additional legislation addresses branch-specific features in some branches.
3) Activity with non-members (admissibility and restrictions)		No provision. I e there is no restriction on trading (including right to distribute dividends)
4) Registration	(a)	Yes, in the register of economic associations, with Bolagsverket (that manages all commercial registers.
5) Minimum number of members	(a)	Three, regardless whether natural or legal persons.. Lag (1987:667) om ekonomiska föreningar 1 kap. 1§,
6) Investor members (admissibility)		No. This provision is not explicitly legislated (!). However, non members may contribute capital (förlagsinsatser, 5 kap, 1-8§). Such “capital deposits” may not carry voting rights nor variable dividend, and have a status comparable to that of preference shares.
7) Admission of new members (rules on)	(d)	A general right of admission (within criteria specified in bylaws) 3 kap 1§. Subject to approval by the board (unless otherwise stipulated by bylaws) on grounds of suitability. No appeal to assembly. Rejection may be challenged in court..
8) Capital variability		Not regulated
9) Minimum capital requirement	(d)	No provision (no legal minimum; symbolical 1 SEK shares allowed) but has to be specified. The lack of lower limit indirectly impacts on level of reserve funds
10) Allocation of the	(b)	No less than 5% of the balanced surplus (10% in financial

surplus and in particular allocation of the surplus to compulsory legal reserve funds		associations) should be allocated to reserve funds. 10 kap, 6§. However, allocation is compulsory only until an upper threshold is reached (same §), which is 20% of the paid-in shares, or – 40% of net assets (both may be quite low in some branches). Otherwise- as the assembly sees fit
11) Distribution of reserves (admissibility and restrictions)	(a)	Not permitted, (10 Kap, 6§ 2nd mom) (unless in liquidation proceedings, when other paragraphs apply))
12) Distribution of dividends on paid-up capital (admissibility and restrictions)		No direct restriction (see 6)
13) Distinction dividends/refunds and distribution of refunds on the basis, and in the proportion to the activity		No clear distinction between dividends and refunds (except för förlagsinsatser, seepoint 3 above). No limit to distribution, which may also include non-members (10 kap, §4.)
14) Voting rights	(c)	One member, one vote, unless otherwise specified in the bylaws.(7 kap. Föreningsstämman, 1§)
15) Sectorial or section meetings (admissibility)	(d)	Yes, if stated in bylaws. (Regulated by 7 kap. 1§ subpar 2, and §12) that allow for the operation of a second tier assembly.
16) Conversion into another legal form of company or entity (admissibility)		No provision. Generally, there is no neat way of moving from one register (I e incorporation form) to another as operating concern.
17) Management and administrative boards/organs: only members eligible?	©	The board members shall be members of the association, unless the bylaws in clearly specified cases permit otherwise (6 kap. 4§, subpar 2). Employee board representation is regulated by other legislation (SFS 1987:1225, 2008:8, 2008:15)
18) Assets devolution in case of dissolution	(c)	Members' right to residual (including reserve funds) considered self evident (unless otherwise stipulated in bylaws). The notion of social (oegennytig) distribution, though not explicitly forbidden, is alien to the Swedish tradition, that concentrates on members' interests.
19) Specific tax treatment (main measures)		No. Reserve funds have same tax status as reserve funds in other commercial enterprises.
20) Public and/or other forms of supervision (auditing), including precautionary supervision, specific for cooperatives and not merely financial (main objects)		No. Basically same provisions and control instances as for other incorporation forms. Rules (or federation bylaws) that limit the choice of auditors considered a breach of competition laws.

4.4. Auditing

Auditing in the Swedish case is, precisely as in other commercial business, quite decoupled from supervision and control. It is carried by external auditors that (a) are elected by the Assembly (unless a different procedure is stipulated in bylaws, (b) have a certified professional standing (the exact requirements varies with association's size and complexity), and (c) are wholly independent of the association that appoints them (neither members nor employees or business partners). The elected auditor(s) may be legal person(s), this constituting the only exception to the general rule that only physical persons are eligible for office. Cooperative federations may provide auditing services to their members, but do not have a legal standing as control organ, or the right to compel their members to use them.

4.5. Registration and control

Economic associations apply to, and are registered with, *Bolagsverket*, the Swedish Companies Registration Office (in a separate register). The office acts as a gatekeeper: applications may be turned down either due to legal deficiencies in the bylaws submitted, formal misses in submitted documentation, on grounds of suspected mal-intent, or, finally, if either the objectives or the means outlined to reach them are judged implausible. The office normally requires clarifications on points it considers unsatisfactory and if the association fails to either correct these or successfully challenge the objections (either in dialogue or, theoretically through a court appeal) it would turn down the registration request. Such a decision would mean that the start-up process is aborted.

For functioning, already registered associations, *Bolagsverket* acts mainly as a depository of reports on board membership (yearly, following elections, and in cases of extraordinary updates), changes in the bylaws, and lists of auditors, and of authorized signatories for the enterprise (firmatecknare). Larger associations are required to send yearly in income and balance statements and auditing reports. The office has the right to request such statements from any registered association. On the whole, the scope of control that is exercised over normally functioning associations is limited to formal issues. Additional control venues exist in cases of complaints from members, legal errors and misses (especially in bylaw modifications and eligibility of board members and auditors), or suspicion of malfeasance. *Bolagsverket* has the right to demand forced liquidation in certain cases[216], or respond to a call to do so if the number of members stays below the minimum number. In liquidation procedures that are initiated by *Bolagsverket,* it also plays a central role in the proceedings. The court plays a corresponding role in liquidations that are initiated by the court of Law.

[216] E.g. continuing lack of updates on the board's composition. The decision would be reversed if the deficiencies are remedied during the process (11 kap 4a§ 2 para)

The County Administrative Board (länsstyrelse)[217] may also step in as a control instance if it receives complaints on flaws in the auditing process or the appointment of auditors (8 kap 9§), and impose higher standards of formal auditing competence, or appoint own auditors.

Generally, the existing control mechanisms are keyed to detecting and preventing tax evasion and sharp practices. To a limited extent (and as a response to direct complaints) they are also intended to provide protection to individual members whose interests are being improperly taken care of. They are definitely not designed to advance political or ideological ends.

4.6. Transformation and conversion

An economic association cannot convert smoothly to a different incorporation form (or vice versa). Different incorporation forms are entered in separate registers and it is virtually impossible to move from one register to another while maintaining full continuity (the SCE register is somewhat of an exception to this rule). If attempted, such a step would presuppose simultaneous liquidation and (re)incorporation—a rather difficult feat, given the time margins written into both procedures.

However, associations have the right to establish non-cooperative subsidiaries. This opens a possibility of gradual conversion, through transfer of rights and liabilities to the subsidiary, a process that would require a great deal of legal competence, and also (since it would probably involve modifications of bylaw provisions on membership shares etc, that require unanimity or privileged majority) strong backing from the members.

4.7. Specific tax treatment

The legislation on Economic Association is mostly modelled after the Joint Stock Company Law (aktiebolagslagen) and it strives for parity between the two forms. There are no substantial differences in the relevant paragraphs in the Taxation Law, and definitely no explicit benefits. Cooperative interest groups claim occasionally that cooperatives are discriminated against, especially regarding possibilities of deferring profits for taxation purposes, and the (primarily individual) taxation of dividends. There is, indeed, a clear contradiction between the demand for transparency inherent in good cooperative management, and the degree of opaqueness that tax-management calls for.

[217] An administrative outreach on county level of the state administration. Not to be confused with the county council (landstinget), which is a local government organ.

4.8. Cooperative promotion

Policy towards cooperatives (and to a considerable extent, the aspirations of the movements), especially from the 1990s and on, was largely guided by the ambition to achieve parity for different incorporation forms, and the insight that preferential treatment in the past has often led to *de-facto* discrimination. Significantly, the cooperative development system, created, gradually, from the mid 1980s and on, was legitimated by the claim that significant public funding is invested in the promotion of "conventional" of enterprises.

The cooperative development system *Coompanion*[218] is a federative national organization of local cooperative development agencies. Each one of these is a fully independent local association[219]. The organization, whose roots reach back to the mid-80s, was formally constituted by its members in 1994. It has at present twenty-five members that together constitute a development system with a nationwide coverage, national impact, and high performance. The historical core task of each local member-organization, (historically called LKU, now operating under the joint brand Coompanion) is to facilitate and support the formation of new organizations within the social economy. The federation as a whole stands out in the considerable population of consultants and local agents in the fields of integration and development, as the only national organization that also links traditional actors within the cooperative sector and the social economy with new groups and initiatives (for an general outline of the system, see Stryjan 2004). The basic tenets, of the system can be summarized as follows:

1) *Public baseline financing*, that provides a minimum level of stability and continuity (and, thus, reliability in the eyes of important others)
2) An institutional requirement for *matching financing*, balances the resource dependence on the political centre. It compels each LKU to cultivate its contacts with local society and maintain its embeddedness.
3) A loosely-coupled *federative structure* that allows sufficient leeway for member-LKUs in accommodating to local conditions' demands, while handling relationships with central political levels in a coordinated fashion.
4) Promotion of a *community of practice*: that links the individuals active within the association in a professional organization of cooperative consultants.

Though dedicated public financing (34 MSEK- ca 3,5 M€/year) is small, as compared to those earmarked for mainstream business and entrepreneurship promotion, the organization managed to generate considerable leverage, through contacts with local government and involvement in projects, and additional revenues. With time, the local associations did manage to establish working contacts with mainstream business development agencies and achieve recognition for the unique competence required for

[218] formerly FKU, an acronym for Association for Cooperative development.
[219] Most are incorporated as "economic associations", though some opted to incorporate as voluntary associations. See Stryjan (2002) for a review of the incorporation forms resorted to by organizations within the Swedish social economy.

cooperative business development. Thus, Campus ReDesign SCE, took its first steps with the support of a local business incubator and the local cooperative development association.

5. Final comments, recommendations

The limited nature of the study, and the fact that it largely deals with a "non-phenomenon" makes drawing of conclusions quite difficult, and these speculative conclusions that may be drawn are possibly relevant for Sweden - at most to some of its Scandinavian neighbours.

Objective factors/thresholds:

Complexity: Given the diversity of national legislations it addresses, it is doubtful that reducing complexity (if at all possible) would improve relevance. As a matter of fact, the regulation is no more complex than national legislation. That it is nonetheless perceived as complex reflects rather lack of familiarity, and the scarcity of expertise. Investing in necessary infrastructure (know how, consultant competence, production manuals) may be preferable to trying to simplify the directive.

Capital requirements: the amount of €30000, while hardly sensational in itself, is considerably higher than capital requirements for a (national) joint stock company, and stands out, in the Swedish context, as exorbitant-- effectively discouraging new starts from applying. A modification of the directive that ties the capital requirement to national (joint stock co.) standards may be a solution (which, however, opens for new complications).

Potential demand/target groups: the established cooperative federations have extensive experience an accumulated experience with trans-border operations within the framework of existing legislation. Breaking this path dependence would be a lengthy process, and eventual incentives may prove difficult to design.

In many respects, new entrants into the field (at times, also representing new branches) may be a more promising target group. However, precisely those groups are nearly excluded at present from the field by (relatively) high objective thresholds. Both steps that lower the existing thresholds and steps aimed at increasing the (perceived) accessibility of the form could be considered.

Proposed steps:

The brief analysis above deals with the case of SCE diffusion as a species of entrepreneurship and innovation. A modest, but realistic, step towards capacity building might be to delegate promotion and capacity building in this field to national organs that deal with promotion of entrepreneurship and economic development. In Sweden, the relevant authority would be the Swedish Agency for Economic and Regional Growth (*Tillväxtverket*). Concrete elements in such an undertaking could be:

a) Commissioning (by own resources, or through tender) easy to follow handbooks and resources for would-be starters.

b) Investing in sufficient counselling capacity (in-house or-preferably- outsourced) to be able to provide such groups with necessary assistance.

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UNITED KINGDOM

By Ian Snaith

SUMMARY. Part 1. Introduction and Methodology. – **Part 2.** UK Cooperative Law. – **2.1.** The History and Structure of the Law**. – 2.2.** The key features of UK Cooperative law and recent developments. – **2.3.** Problems with UK Cooperative law. – **Part 3.** Visibility of the Cooperative sector in the UK. – **3.1.** Business support and prmotion. – **3.2.** Education. – **3.3.** Other developments. – **Part 4.** UK legislation Implementation of the SCE Regulation. – **4.1.** General background to UK implementation. – **4.2.** How are the Articles imposing an obligation to implement dealt with by the UK?. – **4.3.** Transfer of Registered office. – **4.4.** Are the options in the Regulation implemented and how do the chosen options compare with national cooperative law? – **4.5.** Which competent Authorities are designated in accordance with article 78(2) of the Regulation? – **Part 5.** The SCE Regulation and the UK analysis. – **Part 6.** Recommendations and proposals. – **Part 7.** Essential bibliography.

Part 1. Introduction and Methodology

This report begins with a brief critical outline of UK Cooperative Law. This is intended to provide relevant background to the later parts of the report which deal with the visibility of the UK Cooperative Sector and the UK implementation of the SCE Regulation.

The methodology employed has been to collect relevant legislation for submission to the wider SCE Project; to use desk based research on UK law, policy and practice and relevant EU Law and policy and to collect information and opinions through a questionnaire addressed to a few key UK stakeholders.

The full text of the UK implementing legislation for the SCE as enacted was submitted to the Project database in Spain in PDF format. A full set of national co-operative legislation for Great Britain was compiled from the UK Ministry of Justice's Statute Law Database (www.statutelaw.gov.uk), updated (with continuing annotations) to 31.12.09 and submitted to the Project database in Spain in PDF format. Two items of draft legislation under consideration in January 2010 were also submitted to the Project Database and have since been updated.

UK implementing legislation for the SCE was mapped against the SCE Regulation in respect of national obligations with full explanations of the technique used – see Part 4.1 & 4.2. The UK approach to the transfer of the SCE's registered office is outlined in Part 4.3. Both UK implementing legislation and British national co-operative legislation have been mapped against the SCE Regulation in respect of national options available under the SCE Regulation with full explanation of the national provisions - see Part 4.4. The UK competent authorities for the purpose of the SCE Regulation are identified in Part 4.5.

The problems arising from the UK implementation of the SCE Regulation are outlined in Part 5.

An inventory of UK SCE's has been submitted to the Project Database within the National Expert's questionnaire. There are none. A questionnaire from the UK National Expert includes information on Co-operative visibility in the UK and formed the basis of the discussion of those matters in Part 3 below. Questionnaires from 3 stakeholders have been submitted to the Project Database and, together with the national expert's desk based research, provide the basis for the analysis of the SCE Regulation and its implementation in Part 5 and the recommendations and proposals outlined in Part 6.

A full Bibliography of relevant material is included in Part 7 and Annex 1 lists the stakeholders from whom questionnaires were received.

Part 2 UK Cooperative Law

2.1. The History and Structure of the Law

In the UK, a body wishing to function as a co-operative is free to use any legal form it chooses. That includes registering under the Companies Act 2006 or the Limited Liability Partnerships Act 2000 or operating as a partnership under the Partnership Act 1890, subject to restrictions on the use of the word "co-operative" in the name of a registered company. However, the Industrial and Provident Societies Acts 1965 to 2003 (to be renamed the Co-operative and Community Benefit Societies and Credit Unions Acts 1965 to 2010 when s 2 of the Co-operative and Community Benefit Societies Act 2010 is brought into force) provide a legal structure specifically designed for co-operatives. Credit unions, a form of savings and loan co-operative, must register under the 1965 Act as adapted by the Credit Unions Act 1979 and are prohibited from otherwise registering under the Industrial and Provident Societies Acts 1965 to 2003. Similarly, an organisation using any other legal structure (including the SCE form) is prohibited from using the words "credit union" as part of its name (ss 1 to 3 Credit Unions Act 1979). Like other financial services businesses, credit unions are also subject to regulation by the Financial Services Authority (FSA) as authorised deposit takers under the Financial Services and Markets Act 2000. For that reason, this report makes no further reference to the law governing credit unions.

The original Industrial and Provident and Partnership Act 1852 became law at the request of the nascent British co-operative movement and for its benefit. The Act permitted co-operatives to register using a specific legal form designed for them instead of registering as friendly societies (mutual insurance bodies) of a type also permitted to trade. The successive Industrial and Provident Societies Acts of 1862 and 1867 effectively provided a full legal basis for the functioning of co-operatives and that legislation was consolidated in further Industrial and Provident Societies Acts of 1876, 1893 and 1965.

This legal framework has remained largely unchanged ever since, subject to the significant but minor reforms of the twenty first century.

The Financial Services Authority (FSA) is responsible for industrial and provident society registration – a function similar to that performed by the Registrar of Companies for companies registered under the Companies Act 2006. Further information about the FSA and its role as the registry for mutual societies can be found on its website at http://www.fsa.gov.uk/ and in the information notes that it publishes on that site and in print.

Section 1 of the IPSA 1965 lays down the conditions to be satisfied for a society to be registered as an industrial and provident society. It must be a society for carrying on any industry business or trade (including dealings of any description with land) whether wholesale or retail. It must also show 'to the satisfaction of the [Financial Services] Authority' that either (i) it is a bona fide co-operative society or (ii) its business is being or is intended to be conducted for the benefit of the community. When section 1 of the Co-operative and Community Benefit Societies Act 2010 is brought into force it will be clear that the registration is ***as*** one or other of those categories of society.

The FSA Information Notes set out how the FSA's statutory discretion under the IPSA 1965 will be exercised. "*Registration of Co-operatives*" requires a society wishing to register as a co-operative to meet the following conditions:

Community of Interest –"There should be a common economic, social or cultural need and/or interest amongst all members of the co-operative"

Conduct of Business – "The business will be run for the mutual benefit of the members, so that the benefit members obtain will stem principally from their participation in the business. Participation may vary according to the nature of the business and may consist of: buying from or selling to the society; using the services or amenities provided by it; or supplying services to carry out its business."

Control – "Control of a society lies with all members. It is exercised by them equally and should not be based, for example, on the amount of money each member has put into the society. In general, the principle of "one member, one vote" should apply. Officers of the society should generally be elected by the members who may also vote to remove them from office."

Interest on Share and Loan Capital – "Where part of the business capital is the common property of the co-operative, members should receive only limited compensation (if any) on any share or loan capital which they subscribe. Interest on share and loan capital must not be more than a rate necessary to obtain and retain enough capital to run the business..……..."

Profits – "If the rules of the society allow profits to be distributed, they must be distributed amongst the members in line with those rules. Each member should receive an amount that reflects the extent to which they have traded with the society or taken part in its business……..."

Restriction on Membership – "There should normally be open membership. This should not be restricted artificially to increase the value of the rights and interests of current members, but there may be grounds for restricting membership in certain circumstances which do not offend co-operative principles. For example, the membership of a club might be limited by the size of its premises or the membership of a self-build housing society by the number of houses that could be built on a particular site."

Apart from the need to establish that a society meets the "bona fide co-operative" requirement on first registration, it is necessary that it continues to do so. The FSA has power to cancel the registration of a society for failure to adhere to Section 1.

When an application is made to register a co-operative, a copy of its rules is submitted to the FSA. That copy is checked to ensure that the rules do not violate co-operative principles so as to cast doubt on whether the society is a "bona fide co-operative". That process is repeated whenever any application is made to register an amendment to the society's rules and until the amendment is registered it has no legal effect. This system ensures that very considerable freedom is permitted to co-operatives to organise themselves as they choose, so long as the society's rules contain the provisions required by Schedule 1 to the 1965 Act as amended and are consistent with the society's status as a bona fide co-operative. The legislation does not prescribe the content of the society's constitution even in respect of matters such as governance, share capital, distribution of surplus, or members' voting rights. The question of whether particular provisions of the society's rules are to be permitted is always decided on the basis of whether or not those provisions are consistent with co-operative principles as applied by the FSA. However, the use of model rules provided in advance by sponsoring organisations is encouraged by the availability of a very substantially reduced registration fee if such rules are used.

A number of points about the development of the UK legislation assist in understanding the UK regime. The division of industrial and provident societies into co-operatives and societies for the benefit of the community was first introduced by the Prevention of Fraud (Investments) Act 1939 to counteract the fraudulent use of the society form to evade the prospectus requirements of the Companies Acts. Before that, no reference to, or definition of co-operatives, was to be found in the legislation (see Snaith I, "What Is an Industrial and Provident Society?" (2001) 34 Journal of Co-operative Studies 34.1 April 2001 pp 37-42). However, the Co-operative and Community Benefit Societies Act 2010 reinforces that division by requiring registration as one or the other and adopts that terminology as the title of the UK legislation, partly to address the obscurity of the "industrial and provident society" label.

Since the mid-1990's a number of modest changes have been introduced to UK co-operative law which have cumulatively served to update its provisions. In 1996 The Deregulation (Industrial and Provident Societies) Order 1996 *SI 1996/1738* used the powers available to government under the Deregulation and Contracting Out Act 1994 to amend primary legislation by the use of regulations to reduce the minimum number of

members needed to register a society from 7 to 3, to ease the formal documentary requirements for registration, to increase the time limit for registering charges and filing annual returns, and allowing societies the same rights as companies to opt out of full audit requirements.

The Industrial and Provident Societies Act 2002 amended the IPSA 1965 so that the conversion of an industrial and provident society into a company required not only a 75% majority of those voting but also a turnout of at least 50% of those eligible to vote. The Act also empowered the Government to update industrial and provident society legislation to bring it into line with Company Law after any change in company legislation, so long as those parts of the IPSA 1965 which define a co-operative were not changed. That power has been used to further relax the accounting rules applicable to industrial and provident societies with limited turnover (see The Friendly and Industrial and Provident Societies Act 1968 (Audit Exemption) (Amendment) Order 2006 SI 2006/265).

The Co-operative and Community Benefit Societies Act 2003 empowered the Government to develop an “asset lock” for community benefit societies but not for co-operatives. It also brought the provisions about the capacity of the society and of its agents to act, and about executing formal documents into line with those applicable to companies. This levelled the playing field for the co-operative sector in those respects and so reduces their costs.

Since 6th April 2006 the new asset lock regulations for community benefit industrial and provident societies have been in force and available for use (see The Community Benefit Societies (Restriction on Use of Assets) Regulations 2006 SI 2006/264). They implement the provisions of the 2003 Act to "lock in" the value of the assets and resources of a community benefit society. This means that by amending their rules or incorporating a rule from the time of registration, any community benefit society, except a registered social landlord or a charity, may, by unalterable rule, prevent the payment of any amounts of value out to members or others except to pay members, or their successors on death or bankruptcy, the nominal value of any withdrawable shares plus interest. Otherwise any surplus has to go to another society with a similar restriction, a community interest company, a registered social landlord, or a charity - all of which lock value in for their purposes. The FSA is given power to enforce such restrictions on surplus distribution by enforcement notice and can order restitution from society officers if the society suffers loss. It can also seek a court order to prevent or end violation of such a rule.

For co-operatives, 2006 saw the liberalisation of FSA policy on the use of “investor shares” for non-user investor members. The FSA document permits co-operatives to have non-user investor members who hold “Investor Shares”, subject to restrictions to protect the interests of user members. These include restricted voting rights for investor members, compliance with applicable regulatory requirements under FSMA 2000, and an overriding requirement that the society remains, in the FSA’s view, a “bona fide co-operative” (*Investor Membership of Co-operatives registered under the Industrial and Provident*

Societies Act 1965 A Policy Note by Michael Cook and Ramona Taylor, Financial Services Authority, 2006). This change was uncontroversial among those consulted by the FSA as it addressed the need of co-operatives to raise capital.

In March 2010, the Co-operative and Community Benefit Societies Act 2010 became law although it will not come into force until a date to be fixed by the Government. The 2010 Act applies the director disqualification provisions applicable to companies to societies, clarifies the separate registration of community benefit societies and co-operatives under the legislation, gives power for the provisions about the investigation of companies, company names, and dissolution and restoration to the register to be applied to societies by government order, and permits the law applicable to credit unions to be updated by order.

Further reforms under the Legislative and Regulatory Reform Act 2006 have been the subject of consultation by HM Treasury and deliberation by Working Groups on both Credit Union Law and Co-operative Law. Currently, a 2010 Legislative Reform Order under that Act is passing through the legislative process. It will, if passed, abolish the minimum age for society membership, reduce to 16 the minimum age for becoming an officer of a society, remove the limit (currently £20,000) on the amount of non-withdrawable share capital a member other than another society may hold, increase the amount a society may charge a non-member for a copy of its rules, allow societies (like companies) to choose their own financial year ends, remove the requirement that societies (but not companies) have interim accounts audited and allowing dormant but solvent societies to use an easier dissolution procedure (see HM Treasury, Legislative Reform (Industrial and Provident Societies and Credit Unions) Order 2010 Explanatory Document March 2010 http://www.hm-treasury.gov.uk/consult_credit_union.htm).

Currently, the Financial Services Authority, as the regulator for UK co-operatives is engaged in preparing Codes of Practice in collaboration with Co-operatives UK, the apex organisation on the information to be provided to persons holding shares in co-operatives. In addition, they hope to develop further such non-binding Codes on matters such as the governance of agricultural co-operatives with the relevant stakeholders. In each case this is an attempt to deal with existing problems. The collapse of the Presbyterian Mutual Society in Northern Ireland raised concerns about whether the shareholders in the society understood that they were shareholders with funds at risk if the society became insolvent rather than investors in a savings bank protected by a deposit protection scheme. The concerns about governance in agricultural co-operatives arise from the recent collapse into insolvency of Dairy Farmers of Britain, an agricultural marketing co-operative in which members appeared to be badly informed about the financial circumstances of the co-operative.

2.2. The Key Features of UK Cooperative Law and Recent Developments

From the above outline of the UK legal rules the following points emerge:

- As is generally the case in UK business organisation law, the emphasis of the Industrial and Provident Societies Acts 1965 to 2003 is on providing default rules and so maximising the freedom of those using the legal structure to develop and apply their own rules
- That freedom is subject to the registration condition that the society to should meet and to continue to meet the requirement that it be a "bona fide co-operative" with the threat of suspension or termination of its registration if that condition is no longer satisfied
- The tendency in recent years, partly as a result of the SCE Regulation, has been to liberalise the rules governing the capital of co-operative societies. This is seen in the 2006 policy note on investor members (above) and the proposal in the 2010 Legislative Reform Order to remove the limit on the value of shares that may be held by a member in the case of shares that are not withdrawable.
- The efforts to remove differences of treatment between co-operatives and companies which are obstacles to the business operations of co-operatives. This applies to accounting and audit exemptions for SME's, rules about corporate capacity, agency, the age limit on membership and office-holding, rules about the execution of documents and the application of corporate rescue and director disqualification regimes to insolvent co-operatives.
- Reinforcement in the 2010 Act of the clarity of co-operative identity by renaming the legislation and specifying that registration as a co-operative is separate from registration as a community benefit society.

2.3. Problems with UK Cooperative Law

There is no formal legal restriction on activities other than the prohibition on a society with withdrawable (fluctuating) capital engaging in the business of banking without registering under the Credit Unions Act 1979 as a credit union (section 7 IPSA 1965). In addition, to protect co-operative identity and prevent investment fraud, a provision prevents a society with the objective of making profits mainly for the payment of dividend or bonuses from registering as a co-operative (section 1(3) IPSA 1965.

However, neither the registering body for co-operatives (the FSA) nor the government department responsible for their legal framework (HM Treasury) have any obligation or role in relation to the promotion of co-operatives. This tends to leave the sector without promotion in comparison with companies whose business structure is promoted and facilitated by the Department of Business, Innovation and Skills.

The registration system for co-operatives does not operate electronically. Searches have to be carried out manually. This causes problems with credit rating and checks by those with whom they do business. Companies are registered at the Companies Registry, which operates electronically.

The registration fees to establish co-operatives are substantially higher than those applicable to companies registered at Companies House. This is because of the cost of the role of the FSA in checking the constitution to ensure that a co-operative meets the requirements of the legislation as compared to the straightforward procedure involved in ensuring that a company has complied with necessary formalities.

As with the SE and the SCE, different bodies deal with the registration of co-operatives and companies. This helps to ensure that only bona fide co-operatives use the industrial and provident society form. However, it gives rise to the above discrepancies.

In part because of their co-operative structure, co-operatives have greater difficulty raising capital than do investor owned companies. However, the regulator has recently liberalised the position on this, partly in response to the SCE Regulation's provision on non-user investor members, and the 2010 Legislative Reform Order proposes to remove the limit on shareholding by members for non-withdrawable shares.

Part 3. Visibility of the Cooperative Sector in the UK

3.1. Business Support and Promotion

Co-operatives have access to various forms of business advice provided by government through the Business Link Service on the same basis as other businesses (see http://www.businesslink.gov.uk/bdotg/action/home). However, there is no UK wide co-operative advisory body.

The Industrial and Provident Societies Acts 1965 to 2003 remain a United Kingdom legislative function in respect of Great Britain, not devolved to the Scottish Parliament or Welsh Assembly. However, Northern Ireland has its own (virtually identical) legislation which is the responsibility of the devolved Northern Ireland Assembly and all three devolved administrations, together with the UK Government for England, play some role in respect of co-operatives.

In the United Kingdom government, the department responsible for UK wide industrial and provident society legislation is HM Treasury (see http://www.hm-treasury.gov.uk/consult_credit_union.htm). However, it has no clear remit to promote co-operatives. This contrasts with the role of the Department for Business Innovation and Skills (see http://bis.gov.uk/Policies/by/themes/business%20law) which has a more proactive role in respect of the UK wide legislation governing companies.

However, within the Cabinet Office, co-operatives, as part of the "Third Sector" together with charities and community benefit organisations fall within the remit of the Office for the Third Sector (OTS) across England. OTS co-ordinates work across government about voluntary and community groups, social enterprises, charities, cooperatives and mutuals and has a remit to promote social enterprise. The OTS was created in May 2006. They seek to improve cross-government activity by investing in programmes to support the sector, cultivating a helpful policy and regulatory environment for the sector, and developing a strong evidence base and analysis to better inform the work of the Government and the third sector (see http://www.cabinetoffice.gov.uk/third_sector/about_us.aspx).

In Northern Ireland the Department responsible for co-operatives is the Department of Enterprise Trade and Investment which also serves as the Registry for industrial and provident societies and credit unions (http://www.detini.gov.uk/deti-registry-index.htm/)**.** The devolved Scottish Government has established Co-operative Development Scotland as a subsidiary of Scottish Enterprise in 2006 to increase the contribution of co-operative enterprise to the Scottish economy. It has a Scotland-wide remit to 'promote and facilitate the development of co-operative enterprises' (see http://www.cdscotland.co.uk/).

Similarly, the devolved Welsh Assembly Government established the Social Enterprise Ministerial Advisory Group in 2009 to provide direct advice to the Deputy Minister on Social Enterprise in Wales and to work with the Social Enterprise Support Group in the housing and community regeneration department. They aim to create an environment that encourages new social enterprises and encourage the establishment of integrated support for the sector involving mainstream and specialist agencies (see http://wales.gov.uk/topics/housingandcommunity/regeneration/socialenterprise).

In addition there are 9 regional co-operative councils in England and about 25 specialist co-operative business advisors as well as 20 sector specific co-operative federals (information from Co-operatives UK and (see **http://www.cooperatives-uk.coop/Home/miniwebs/miniwebsA-z/co-operativeDevelopment/cdbs**)

3.2. Education

In education, The Co-operative College, an educational charity founded in 1919 with close links to the UK Co-operative Movement, serves the co-operative sector in the UK. It concentrates on member and manager education within UK co-operatives and social enterprises, global co-operative development work in co-operation with the UK Department For International Development, NGO's and co-operatives in other countries, the protection and use of co-operative heritage (in co-ordination with the Co-operative Heritage Trust) and work with schools and young people to promote awareness of co-operative business systems and values.

The work in schools is part of the Government's education reform strategy for England and the College has worked with the Co-operative Group and schools to develop a distinct co-operative trust model that enables schools to embed co-operative values into the long term ethos of the school. Through http://www.school.coop/ the College has promulgated teaching resources developed by the network of Co-operative Business and Enterprise Schools and Colleges. The materials are freely available for use within education and have been developed co-operatively benefiting from a national and international co-operative network (see http://www.co-op.ac.uk/)

The College also manages the Rochdale Pioneers Museum and the National Co-operative Archive collections.

The recently established Centre for Mutual and Employee Owned Businesses at Kellogg College, Oxford aims to compile evidence on the performance of the mutual and co-owned business sectors; deliver a curriculum for current and future leaders of the mutual and co-owned business sectors; advance knowledge about the mutual and co-owned business sectors, encourage debate and new thinking, disseminate research outcomes extensively, and widen interest in and support for the sectors nationally and internationally; and provide a hub for networking academics and practitioners with interests in the mutual and co-owned business sectors (http://www.kellogg.ox.ac.uk/researchcentres/meob.php).

3.3. Other Developments

The UK Government has, in recent years, been interested in promoting the use of co-operative and other non-profit distributing models, and has tended to do so by establishing a "social enterprise unit" within an existing department. This happened, for example, in the Department of Trade and Industry (as it then was), the Department of Health, and Communities and Local Government.

Government funding has facilitated the development Supporters Direct to facilitate the establishment of mutual Supporters' Trusts in particular football clubs. They aim at gaining influence for fans in clubs and trusts have been established in 160 football clubs throughout the UK with expansion now into the field of Rugby League (see http://www.supporters-direct.org/page.asp?p=1988)

In the consumer sector, The Co-operative Group has rolled out a single brand for itself and for the remaining independent retail co-operative societies in line with recommendations of the Co-operatives Commission 2001 (http://www.co-opcommission.org.uk/COOP.PDF). It has also restored the policy of distribution of dividend to customers by declaring a distribution of profits and increased market share by buying Somerfield - a large privately owned chain. Co-operative Financial Services has

expanded with the merger of the Britannia Building Society into the organisation to add to the Co-operative Bank PLC and the Co-operative Insurance Society Ltd.

Part 4. UK Legislation Implementation of the SCE Regulation

This section considers: (i) the general background of UK implementation, which is based on the direct applicability of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) *OJ L 207, 18.8.2003, p. 1–24* ("The SCE Regulation"); (ii) in tabular form, the treatment in the UK implementation of Articles of the SCE Regulation imposing an obligation on member states; (iii) the question of the transfer of the registered office of an SCE; (iv) in tabular form, how the UK dealt with the various options offered to member states in the SCE Regulation with a comparison of the equivalent provisions in national co-operative law; and finally (v) with the designation of competent authorities under art 78(2) of the SCE Regulation.

4.1. General Background to UK Implementation

The SCE Regulation has been implemented under UK by law The European Co-operative Society Regulations 2006 SI 2006/2078 (hereinafter, the 'SI 2006/2078') in accordance with powers conferred on HM Treasury under section 2(2) of The European Communities Act 1972. Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees *OJ L 207, 18.8.2003, p. 25–36* ("The SCE Directive") was implemented by The European Co-operative Society (Involvement of Employees) Regulations 2006 SI 2006/2059. Both entered into force on 18th August 2006. Where the applicable law for an SCE under the Article 8 of the SCE Regulation is the law which would apply to a cooperative formed in either Great Britain or Northern Ireland, that will generally be the Industrial and Provident Societies Acts 1965 to 2002 (hereinafter IPSA) in Great Britain and the Industrial and Provident Societies Act (Northern Ireland) 1969 (hereinafter IPSA (NI)).

The UK implementation of the SCE legislation is based on accepting that the SCE Regulation is directly applicable under the Treaty (Article 288 TFEU ex 289 TEC). As a result, it enters the law of the different jurisdictions of the United Kingdom directly and with the full application of the doctrine of the supremacy of Community Law (section 2(1) of the European Communities Act 1972; Case 6/64 Flaminio Costa v ENEL [1964] ECR 585; and R v Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] 1 AC 603.).

SI 2006/2078 therefore deals only with those matters in respect of which the SCE Regulation specifically requires legislation on the part of a Member State either to exercise an option or to set up the necessary machinery for implementation. SI 2006/2059, on the

other hand deals more comprehensively with matters affecting employee involvement because the community legislation takes the form of a directive which needs national implementation (paragraphs 1.14 to 1.22 of HM Treasury and DTI, *The European Co-operative Society, A consultation document,* March 2006).

4.2. How are the Articles imposing an obligation to implement dealt with by the UK?

Article Imposing Obligation	UK Provision Implementing Article
Article 4(6) Capital of SCE – appointment experts and valuation of non-cash consideration	Sections 583, 593 to 597 and 1150 to 1153 of the Companies Act 2006 will apply by virtue of the direct applicability of the SCE Regulation.
Article 7 (8) Transfer of Registered Office competent authority to issue certificate attesting to completion of pre-merger formalities	Regulation 3(1) of SI 2006/2078 designates the Financial Services Authority ("FSA"), for Great Britain, and the Registrar of Credit Unions for Northern Ireland ("Northern Ireland Registry"), for Northern Ireland, for the purpose of (inter alia) Article 7. Since Article 7(8) is directly applicable that competent authority would issue the necessary certificate. Regulations 12(2), 14 to 16 deal with other aspects of the procedure involved in such a transfer of registered office. These competent authorities are not the same ones as deal with mergers of public limited-liability companies, but it is not clear that the SCE Regulation requires this.
Article 11(1) Registration and Disclosure Requirements	Regulation 8 of SI 2006/2078 requires the FSA (for Great Britain) and the Northern Ireland Registry (for Northern Ireland) to establish and maintain registers of SCE's in their respective jurisdictions and designates those registers for the purpose of Article 11(1). This is not the same register as is used for public limited-liability companies but those authorities do maintain the registers on which cooperatives governed by national law are registered.
Article 26(1) Report of Independent Experts for the Merger	Sections 583, 593 to 597 and 1150 to 1153 of the Companies Act 2006 will apply by virtue of the direct applicability of the SCE Regulation.
Article 29(2) Scrutiny of Merger Procedure	Regulation 3(1) of SI 2006/2078 designates the FSA, for Great Britain, and the Northern Ireland Registry, for Northern Ireland, for the purpose of (inter alia) Article 29. Since Article 29(2) is directly applicable, that competent authority would issue the necessary certificate. Regulation 5 requires a participating UK cooperative to provide the authority with necessary documents and evidence of compliance with the SCE Regulation.
Article 30(1) Scrutiny of Legality of Merger	Regulation 3(1) of SI 2006/2078 designates the FSA, for Great Britain, and the Northern Ireland Registry, for Northern Ireland, for the purpose of (inter alia) Article 30. Since Article 30(1) is directly applicable, that competent authority would

	perform the necessary scrutiny. Regulation 9 requires an SCE formed by merger to provide the competent authority with necessary documents and evidence of compliance with the SCE Regulation.
Article 35(5) Procedures for Formation by Conversion – appointment of independent experts	Regulation 7 and regulation 9(3) SI 2006/2078 require such a report to be provided to the competent authority. However, no specific national provision is made for the appointment of the expert. There appears to be no provision of national co-operative law which could be applied to fill this lacuna. However, by virtue of the directly applicable provisions of articles 4(6) and 35, and in the light of recitals (13) and (18), of the SCE Regulation, it is arguable that the provisions of Companies Act 2006 dealing with independent valuation in the context of the provision of non-cash consideration for shares (sections 583, 593 to 597 and 1150 to 1153) should apply. However, those provisions do not provide for one or more experts "appointed or approved……by a judicial or administrative authority" but one or more experts appointed by the co-operative wishing to convert into an SCE.
Article 70 Auditing	Sections 1209 to 1264 of the Companies Act 2006 will apply by virtue of the direct applicability of the SCE Regulation.
Article 73 Winding Up	Regulation 32(2) of SI 2006/2078 empowers the FSA and the Northern Ireland Registry to give a direction (enforceable by a court application for an injunction) to an SCE to regularise its position in accordance with article 73(2) of the SCE Regulation within a stated time. Regulation 33 of SI 2006/2078 amends the Insolvency Act 1986 by inserting a new section 124C and the Insolvency (Northern Ireland) Order 1989 by the insertion of a new section 104C, to allow the FSA or the Northern Ireland Registry, respectively, to petition the court for the winding up of an SCE on the grounds of a breach of the kind mentioned in article 73(1) or 73(3) of the SCE Regulation. That power would be used after a failure by the SCE to comply with the direction or court order enforcing it. This replicates regulation 73 of the European Public Limited-Liability Company Regulations 2004 SI 2004/2326 but the competent authority is different as the powers for the SE lie with the Secretary of State for Business.
Article 76 Conversion into a Cooperative	Regulation 27 of SI 2006/2078 empowers the competent authority to approve the appointment of the independent expert by the SCE for the purpose of article 76(5).
Article 78 National Implementing Rules	Regulation 3(1) of SI 2006/2078 designates the FSA, for Great Britain, and the Northern Ireland Registry, for Northern Ireland, for the purpose of articles 7,21, 29, 30, 54, and 73

4.3. Transfer of Registered Office

(a) Underlying UK Legal Position and Transfers within the UK

The UK applies the place of registration theory to determine the domicile of a legal entity, such as a company or co-operative society, and so to the question of whether English, Scottish, or Northern Irish law or the law of any other jurisdiction applies to it (*Gasque v Inland Revenue Commissioners* [1940] 2 KB 80). For the purpose of the registration of an SCE there are two competent authorities in the UK: the FSA for Great Britain (the combined jurisdictions of (a) Scotland and (b) England and Wales); and the Registrar of Credit Unions for Northern Ireland for the jurisdiction of Northern Ireland (Reg 3 SI 2006/2078). Each is required to establish and maintain a register of SCE's which have their registered office in the area it covers and those registers are designated for the purpose of the registration and disclosure requirements of Art 11 of the Regulation (Reg 8 SI 2006/2078).

Under the UK rule of national law determining domicile, there is no need for the SCE's head office to be in the jurisdiction in which the entity is registered. However, pursuant to the Regulation, the registered office of an SCE must be located in the same Member State as its head office (Art. 6 SCE Regulation). In the UK context, an SCE may have its registered office in one UK jurisdiction, e.g. England and Wales, and its head office in another, e.g. Northern Ireland or Scotland. The UK has not used the option, provided in article 6 of the SCE Regulation, to require both registered office and head office to be in the same place.

The rules about the transfer of an SCE's registered office from one Member State to another are set out in Article 7 of the SCE Regulation and SI 2006/2078 deals with that issue (see (b) and (c) below). However, no provision is made in SI 2006/2078 about the transfer of an SCE's registered office from Great Britain to Northern Ireland or vice versa. The competent authority for either of those areas may cancel the registration of an SCE at the SCE's request (Reg. 12(2) SI 2006/2078), it would seem that registration of the SCE in the other part of the UK might require the formation of a new entity. However, under the national law applicable to co-operatives, the rules of an SCE registered in Northern Ireland may be capable of being recorded in Great Britain and vice versa so as to allow the SCE to be treated as registered in the other jurisdiction for certain purposes (s.76 IPSA 1965 and s 102 IPSA(NI) 1969 applied under Art 8(1)(c)(ii) Reg.). The freedom to have a head office in a different UK jurisdiction or registration area from the registered office would seem to make it unlikely that this complexity in the national rules will cause much inconvenience.

(b) Transfer from the UK to another Member State – including creditor protection

A number of documents must be sent to the UK competent authority (the FSA or the Northern Ireland Registry depending on where the SCE's registered office is located) at

least two months before the date of the general meeting called to decide on the transfer of its registered office from the UK to another Member State (Reg 15(1) SI 2006/2078).

They are: the draft transfer proposal drawn up in accordance with article 7(2) of the SCE Regulation; the report drawn up in accordance with article 7(3) of the SCE Regulation; and a solvency statement drawn up in accordance with Reg 14 of SI 2006/2078.

The solvency statement must be made by all the members of the administrative organ (or, in the case of a two tier SCE, the members of the management organ with the approval of the supervisory organ) to satisfy the UK competent authority that the interests of creditors and the holders of other rights in respect of the SCE have been adequately protected in respect of liabilities arising before the transfer. The document must state that those making it have formed the opinion that, for the twelve months immediately following the date of the transfer of its registered office, the SCE will be able to carry on business as a going concern and pay its debts as they fall due. In forming their opinion those making the statement must take into account their intentions for the management of the SCE's business during that year, the financial resources available to the SCE in that year and those liabilities relevant under UK national corporate insolvency law to the question of whether a company is unable to pay its debts (Reg 14 SI 2006/2078). It is a criminal offence for a person to make a solvency statement without reasonable grounds for the opinion expressed in it (Reg 35 SI 2006/2078). The requirement to provide a solvency statement is the UK's means of ensuring the adequate protection of the interests of creditors and others in respect of liabilities arising prior to the publication of the transfer proposal. It also extends to liabilities arising, or that may arise, prior to the transfer (Art 7(7) Reg).

The SCE must notify all its members and creditors and known holders of other rights against it, in writing, more than one month before the date of the general meeting to consider the proposal of their right under article 7(4) to examine and obtain copies of the transfer proposal and the report drawn up under article 7(3) in advance of that meeting (art 7(4) Reg and Reg 15(3) SI 2006/2078).

Every invoice, order for goods or business letter issued on behalf of the SCE must state that a transfer of registered office is proposed and name the state to which the office is to be transferred. This obligation runs from the date, at least one month before the decision-making general meeting, on which its creditors and others are entitled to inspect the transfer proposal to the date of deletion of the SCE's name from the UK register or the date on which the proposed transfer is aborted (Reg 15(4) SI 2006/2078).

When an SCE's registered office is transferred from the UK to another Member State, the SCE's registration in the UK will be cancelled only after the UK competent authority has received notification of the SCE's new registration from the registry responsible for that in the other member state (Reg 12(1)(c) of SI 2006/2078 and Article 7(11) SCE Regulation).

The SCE Regulation provides that the Member States can object to the transfer of an SCE's registered office for reasons of public policy. In the UK, the competent authority (the FSA, or the Northern Ireland Registry) has the right to object if the transfer would result in a change of the law applicable to the SCE. If the SCE receives a written notice of objection to the transfer and grounds for its opposition, issued by the competent authority, within two months of the publication of the draft transfer proposal, the SCE must not transfer its registered office until it succeeds in an appeal against the decision (Reg 15 SI2006/2078). The SCE may appeal to the court within one month of the date of issue of the notice and the court may vary or set aside the competent authority's decision to object to the transfer (Regulations 25(2) & (3) SI 2006/2078).. Depending on the location of the SCE's registered office, the appeal must be brought in the High Court of England and Wales, the High Court of Northern Ireland, or the Scottish Court of Session (Regulation 25(1) SI 2006/2078).

(c) Transfer from Another Member State to the UK

In the case of a transfer of an SCE's registered office from another Member State to the UK, the SCE must send the FSA or the Northern Ireland Registry a copy of its statutes, a list of members of the board of directors (or of both supervisory and management boards in the case of a two tier SCE), with their dates of birth (or of incorporation for corporate members), addresses (or registered office), nationality and occupation (for individuals). The list must be signed by or on behalf of the SCE members and by each listed person giving their consent to act. In addition, a statutory declaration by a solicitor involved in the process or a listed person must be filed confirming compliance with the requirements of the Regulation and SI 2006/2078 for the transfer of the SCE's registered office (regulation 9 SI 2006/2078). The UK competent authority is then obliged to register the SCE if it is satisfied that the requirements for the transfer of its registered office to the UK have been met and the competent authority may accept the statutory declaration as sufficient evidence of that (reg 10 SI 2006/2078).

Section 17 of the Corporation Tax Act 2009 states that the cross-border transfer of an SCE's registered office to the UK will make the SCE tax resident in the UK from the date of its UK registration. This prevents the SCE from being resident in any other place from then on, despite any other rule of law. However, such an SCE does not cease to be tax resident in the UK merely because it later transfers its registered office elsewhere.

4.4. Are the Options in the Regulation Implemented and how do the chosen options compare with national Cooperative Law?

Option In Regulation	UK Choice	GB National Cooperative Law
Article 2(2) Formation	Legal body with head office outside EU may participate in formation on conditions laid down in SCE Regulation - Regulation 4 SI 2006/2078	No restriction based on location of head office or registered office of participant in formation – section 2 Industrial and Provident Societies Act 1965
Article 6 Location of Head Office and Registered Office in same place	Only required to be in same Member State not same place.	No such requirement - *Gasque v Inland Revenue Commissioners* [1940] 2 KB 80
Article 7(2) Transfer of Registered Office – additional forms of publication?	Copy of transfer proposal to be sent to UK competent authority; solvency statement to be made and filed (see (ii)(b) above for detail); written notification of members and creditors of right to examine and copy solvency statement, Article 7(3) report and draft transfer proposal; statement of proposed transfer on all invoices, orders and business letters before decision – regulations 14 and 15 of SI 2006/2078	No equivalent requirements as no procedure for transfer of registered office between jurisdictions without liquidation or cancellation of registration. In the case of an amalgamation or transfer of engagements within or between two societies but involving different UK jurisdictions, there is simply a provision stating that the interests of creditors are not to be prejudiced - section 54 IPSA 1965.
Article 7(7) Transfer of Registered Office – liabilities arising before transfer	Solvency statement extends to liabilities arising before transfer – regulation 14(1) SI 2006/2078 No special provision for public bodies.	As immediately above. No special provision for public bodies.
Article 7(8) Transfer of Registered Office - certificate	Designation of competent authority in regulation 3 of SI 2006/2078 and direct applicability of SCE Regulation	As above article 7(2)
Article 7(14) Transfer of Registered Office – right to oppose	Competent authority can oppose on grounds of public interest – regulation 16 of SI 2006/2078. Appeal available to court – regulation 25 of SI 2006/2078	As above article 7(2)
Article 8(1) national implementing laws to govern matters not regulated or partially regulated by SCE Regulation	UK implementing provisions mainly focus on obligatory provisions and options – see paras 1.14 and 1.15 of HM Treasury and DTI, *The European Cooperative Society, A consultation document,* March 2006	Not Applicable

Article 8(2) Specific rules or restrictions about business or controls	No such provisions explicitly relate to SCEs. However, as a legal entity an SCE would be subject to the same rules as any other person regulated by e.g. the Financial Services and Markets Act 2000 if it engaged in banking, insurance or other regulated activities	National cooperatives are subject to the same principle except that an industrial and provident society with withdrawable (fluctuating) share capital is not permitted to engage in banking business – section 7 IPSA 1965
Article 11(4) amendment of statutes by management or administrative organ to conform with employee involvement arrangements	Such power is conferred by regulation 17 of SI 2006/2078. Regulation 32(1) also empowers the competent authority to give directions if the relevant organ fails to do this.	Not applicable – there are no mandatory employee involvement obligations.
Article 12 (1) Publication of Documents	London, Edinburgh or Belfast Gazette designated – regulation 40 of SI 2006/2078	This conforms with publicity requirements for UK cooperatives and companies – section 74 IPSA 1965 and section 1173(1) Companies Act 2006.
Article 12 (2) Branches	The UK competent authorities are required to establish and maintain registers of branches in which the documents and information required by Directive 89/666/EEC are filed and in which a UK branch of an SCE registered in another member state is registered. The register is kept by the cooperatives regulator rather than the company regulator – regulation 13 of SI 2006/2078.	No equivalent in national co-operative law. For companies sections 1044 to 1059 of the Companies Act 2006 and The Overseas Companies Regulations 2009 SI 2009/1801 apply the directive's requirements
Article 14(1) Non-user investor members	No legal provision in UK	In respect of both SCEs and societies registered under national law, the FSA has accepted that admitting non-user investor members within the limits laid down for SCE's in the EC Regulation does not take the body outside its understanding of the definition of a "bona fide co-operative" in the condition for registration laid down in section 1(2)(a) of IPSA 1965 (Financial Services Authority, *Investor Membership of Co-operatives Registered under the Industrial and Provident Societies Act 1965: Policy Note by Michael Cook and Ramona Taylor* (2006)).

Article 21 Opposition to Merger	The UK competent authority may, on public interest grounds, oppose the participation of a UK registered cooperative in the formation of an SCE by merger in any Member State – regulation 6 of SI 2006/2078. Right of appeal to the courts – regulation 25 of SI 2006/2078	No equivalent provision
Article 28(2) Protection for members opposed to merger.	The UK decided not to make such provision - see Appendix A of HM Treasury and DTI, *The European Co-operative Society, A consultation document,* March 2006	No equivalent provision in national co-operative law.
Article 35(4) Formation by conversion (publicity)	Copy of Article 35(5) certificate, Article 35(3) report and draft terms of conversion to be sent to UK competent authority; written notification of members and creditors of right to examine and copy those documents; statement of proposed conversion on all invoices, orders and business letters before decision on conversion – regulation 7 of SI 2006/2078	No equivalent procedure in national co-operative law.
Article 35(7) Formation by conversion (decision made conditional on qualified majority or unanimity in controlling organ?)	No UK provision.	No equivalent provision
Article 37(1) managing director in two tier SCE as for national co-operatives	No UK provision.	No such provision in national co-operative law – issue left to each co-operative's rules
Article 37(2) power of general meeting to appoint and remove members of the management organ	Statutes of UK registered SCE permitted to provide for such appointment or removal – regulation 18 of SI 2006/2078	Such an arrangement permitted by national co-operative law.
Article 37(3) Time limit on service of supervisory organ member on management organ?	UK lays down no time limit.	Similar approach in national law – issue left to rules of each co-operative
Article 37(4) Minimum and maximum number of management organ members	UK lays down minimum of three and no maximum – Regulation 19 SI 2006/2078	Three is minimum number of members to register a national co-operative but no limits are fixed on the number of committee members or members of other organs –

		section 2(1) IPSA 1965
Article 37(5) measures to provide for two tier system	Provision made for UK registered SCE – regulations 2 and 17 to 22 of SI 2006/2078	Such matters left to rules of each co-operative society by national co-operative law – section 1 and Schedule 1 IPSA 1965
Article 39(4) Minimum and maximum number of supervisory organ members	UK lays down minimum of three and no maximum – Regulation 19 SI 2006/2078	See reply for article 37(4) above
Article 40(3) right of each member of supervisory organ to information	UK confers right on any member of the supervisory organ to require the management organ to provide information needed to exercise supervision in accordance with Article 39(1)	Such matters left to rules of each co-operative society by national co-operative law – section 1 and Schedule 1 IPSA 1965
Article 42(1) managing director in one tier SCE as for national co-operatives	No UK provision.	No such provision in national co-operative law – issue left to each co-operative's rules
Article 42(2) Minimum and maximum number of administrative organ members	UK lays down minimum of three and no maximum – Regulation 19 SI 2006/2078	See reply for article 37(4) above.
Article 42(4) measures to provide for one tier system	Provision made for UK registered SCE – regulations 2 and 17 to 19 and 21 to 22 of SI 2006/2078	Such matters left to rules of each co-operative society by national co-operative law – section 1 and Schedule 1 IPSA 1965 but the one tier system is most commonly found.
Article 47(1) two or more with authority to represent SCE allowed to exercise authority separately	No UK provision to this effect. A UK registered SCE can either appoint a single person or two or more to act jointly – regulation 22(1) of SI 2006/2078	Such matters are left to a combination of: the rules of each co-operative society; delegation of authority by those acting within those rules; the common law of agency; and statutory provisions protecting third parties – s1 and sched 1 of IPSA 1965 and see below
Article 47(2) Ultra Vires acts	UK uses this option as permitted – regulation 21 of SI 2006/2078	For UK co-operatives no act can be questioned due to incapacity of the society according to its objects. In favour of anyone dealing with the society in good faith, the power of the committee to bind the society, or to authorise others to do so, is deemed free from constitutional limitations. But exceptions apply to dealings between the society and its individual committee members and to charitable societies – ss7A to 7F

		IPSA 1965 inserted by s 3 of CACBSA 2003 A third party who knows that an agent has no actual authority cannot rely on apparent authority to enforce a transaction under agency law - *Criterion Properties PLC v Stratford UK Properties LLC* [2004] UKHL 28
Article 47 (4) representation power and reliance against third parties	A UK registered SCE can either appoint a single person or two or more to act jointly and such provision may be relied on against third parties subject to article 47(2) of the SCE Regulation – regulation 22 of SI 2006/2078	See entries for Article 47(1) and 47(2).
Article 48(3) Determination of minimum powers of particular organs to authorise transactions	No UK Provision. Left to SCE statutes subject to the requirements of the SCE Regulation.	Matter left to the rules of each co-operative.
Article 50(3) Variation of quorum and decision-making where employee participation	No UK provision.	No such provision in UK national co-operative law
Article 54(1) General Meeting at any time in first eighteen months after incorporation	This is permitted – regulation 23 of SI 2006/2078	Provision for general meetings left to the rules of each co-operative society.
Article 54(2) Power to convene general meeting	No specific provision for SCE's	The FSA may call a special meeting of a society at the request of the lower of 10% of the co-operative's members or 100 members - Section 49 of IPSA 1965.
Article 59 Voting Rights	No specific provisions have been made in the UK implementing legislation on these matters. As a result, under article 8(1)(c)(ii) & (iii) national co-operative law or the SCE's statutes will govern the issue. Thus the voting provisions contemplated in Article 59 (2), (3) and (4) may well be allowed up to the limit laid down in the SCE Regulation as being consistent with the co-operative nature of the SCE.	Under national law matters of voting rights are not generally subject to specific statutory provisions apart from in cases of re-organisation in accordance with a statutory procedure. As long as a co-operative's rules deal with such matters in a manner considered consistent with the society being a "bona fide co-operative" they will be permitted – section 1(2) and Schedule 1 IPSA 1965. The decision is made by the body responsible for registration.
Article 61(3) Quorum Requirements	The UK chose to fix no such limits on the basis that "the SCE	For national co-operatives this question will be decided by the

	should be free to prescribe their internal rules, in so far as permitted by the [SCE] Regulation" - see Appendix A of HM Treasury and DTI, *The European Co-operative Society, A consultation document,* March 2006	body responsible for registration using the "bona fide co-operative" test as above.
Article 63(1) Sectoral or Section Meetings	This is permitted precisely in the way laid down in the SCE Regulation – regulation 24 of SI 2006/2078	For national co-operatives this question will be decided using the "bona fide co-operative" test as above.
Article 65 Legal Reserve	No specific UK mandatory provision for SCE's.	No mandatory provisions for national co-operatives
Article 68(1) Accounting Requirements	No amendment to legal provisions implementing directives 78/660/EEC and 83/349/EEC. They apply through the direct application of article 68 of the SCE Regulation.	National co-operatives are subject to some limited aspects of the provisions implementing the Directives but are generally subject to a different regime under the Friendly and Industrial and Provident Societies Act 1968 as later amended.
Article 71 Special Auditing System	No such regime applies to UK registered SCE's	No such regime applies to UK co-operatives
Article 75 Distribution of Assets on Winding UP	No specific provision has been introduced for UK SCE's.	National co-operatives can provide in their rules for a system of distribution which is either disinterested or otherwise in line with the nature of a bona fide co-operative. A distribution in proportion to each member's transactions with the co-operative (other than providing a capital contribution) over a particular period fixed by the rules would probably be acceptable.
Article 76(4) Conversion of SCE into Co-operative - Publicity	Copy of Article 76(5) certificate, Article 76(3) report and draft terms of conversion to be sent to UK competent authority; written notification of members and creditors of right to examine and copy those documents; statement of proposed conversion on all invoices, orders and business letters before decision on conversion – regulation 26 of SI 2006/2078	No equivalent procedure in national co-operative law.
Article 76(6) Conversion of SCE into	A quorum of 50% of members is applied but only a	No equivalent procedure applies to national co-operatives.

Co-operative - Decision	simple majority of those voting is required for the conversion – regulation 28 of SI 2006/2078	
Article 77 Expression of Capital	The regime applicable to public limited-liability companies is applied to SCEs – regulation 39 of SI 2006/2078. Initial authorised minimum share capital must be designated in sterling or Euros but otherwise its capital can be designated in any currency whatsoever – ss. 542(3) and 765(3) of Companies Act 2006.	No minimum capital requirement. Uncertain whether: (a) free to designate capital in any currency at common law by analogy with law applicable to companies before there was specific statutory provision – Re Scandinavian Bank Group PLC [1988] Ch 87; or (b) unable to do so as maximum permitted shareholding limit designated in sterling - s 6 IPSA 1965.

4.5. Which Competent Authorities are designated in accordance with article 78(2) of the Regulation?

The UK competent authorities are: The Financial Services Authority for Great Britain (the combined jurisdictions of (a) Scotland and (b) England and Wales); and the Registrar of Credit Unions for Northern Ireland for the jurisdiction of Northern Ireland - Regulation 3 of SI 2006/2078.

Part 5. The SCE Regulation and the UK: Analysis

One consequence of the approach adopted in SI 2006/2078 is that the already complex mosaic created by the SCE Regulation, with its legislation by reference to various national laws and the SCE's own statutes, remains in place and no consolidated source of rules applicable to a UK registered SCE is created. The sources to be consulted in connection with a UK registered SCE include: the SCE Regulation, the SCE Directive, SI 2006/2078, SI 2006/2059, national co-operative law (the Industrial and Provident Societies Acts 1965 to 2003), the Companies Act 2006 where it implements company law directives applied to the SCE by the SCE Regulation, and the Insolvency Act 1986 as amended by the Enterprise Act 2002 as applied by section 55(1) of the IPSA 1965. In addition, in respect of some matters, the SCE's own statute will have to be consulted where this combination of legal provisions still leaves the matter to be determined by that source.

The above sources also presuppose an understanding of the hierarchy of applicable laws created generally by the UK legal mechanisms for direct applicability and supremacy of EC Law (the European Communities Act 1972 and relevant UK case law such as R v Secretary of State for Transport, ex p. Factortame Ltd. (No. 2) [1991] 1 AC 603) and

specifically by article 8 of the SCE Regulation. In addition, while the implementing SCE legislation and the Companies Act 2006 apply across the whole UK, national cooperative law and national insolvency law are found in different legislative instruments for Great Britain, on the one hand, and Northern Ireland on the other (the Industrial and Provident Societies Acts 1965 to 2003 and The Insolvency Act 1986 as amended for Great Britain and the Industrial and Provident Societies Act (Northern Ireland) 1969 and the The Insolvency (Northern Ireland) Orders of 1989, 2002 and 2005), although in both cases the content of the legislation is virtually identical.

The approach of the UK to implementation of the SCE Regulation was heavily influenced by the policy of providing maximum freedom to those establishing an SCE to determine their own internal rules – so far as allowed by the SCE Regulation (See paragraph 1.19 and Appendix A2 of HM Treasury and DTI, *The European Co-operative Society, A consultation document,* March 2006). This is consistent with the approach to national co-operative law and the law applicable to companies in which the emphasis is on maximising the freedom of those using the corporate body to arrange their own affairs as they choose.

The respondents to the three questionnaires completed by UK stakeholders tend to confirm the problems with the SCE Regulation. All respondents indicated that they knew what the SCE was although the practitioner emphasised that this was not as a result of any practical experience of the legal form. Similarly, two of the three indicated that they saw the purpose of the structure as facilitating transnational operations and mergers for co-operatives within Europe.

All three respondents agreed that the general co-operative movement and their associated co-operatives lacked awareness of the SCE. Reasons given for this included: absence of awareness of constitutional issues on the part of people establishing and operating co-operatives; lack of knowledge about the SCE and other co-operative structures on the part of professional advisors; absence of machinery at the FSA to actually register an SCE; lack of reasons on the part of co-operatives to use the structure; the absence of a government department specifically charged with co-operative promotion; the small scale of many UK co-operatives; and the absence of objectives or business models on their part which lead to operations on an international scale.

The absence of UK registered SCE's was attributed to the factors mentioned in the last paragraph as well as the complexity of the SCE as a structure. The minimum capital requirement, the costs of setting up, and the absence of a specific tax regime were also seen by one respondent as possible factors. In terms of improving the chances of the SCE structure being used, one respondent believed simplification might help and one was of the view that it would not. The third took the view that it would not be sufficient on its own.

The respondent from the regulating body for SCE's in Great Britain stated that it had been agreed between the two registering authorities in the UK that they would consult

each other on every application to register an SCE and so seek to ensure that the SCE legislation was interpreted in the same way throughout the UK

It seems, therefore, that the problems with the profile of co-operatives in the UK, the limited need for transnational operations and the lack of awareness of the SCE and other co-operative structures among professionals were the main negative factors according to UK respondents.

Part 6. Recommendations and Proposals

Simplification of the SCE Regulation at EU level, while it may not be sufficient on its own to deal with the limited use of the structure, would clearly facilitate understanding and use of the SCE.

The consolidation in one legal source of the diverse legal norms applicable to UK SCE's from the various EU and UK legal instruments that apply to them would similarly facilitate use.

However, the SCE is hardly likely to be widely used when the cooperative form is generally little know or considered among professionals and relevant advisors. Similarly, the fragmentation of co-operative promotion initiatives and resources between the four UK nations and even within the UK government itself is unhelpful. By comparison, the central and pro-active role of the Business, Innovation and Skills Department of the UK Government in facilitating the use of other business structures and ensuring that business law is user friendly and uniform across the UK avoids many of those problems where companies are concerned.

Similarly, the lack of electronic registration and searching facilities for societies and the higher cost of using the society form compared with the costs applicable to companies are problems for all UK co-operatives. For the formation of SCE's the existence of machinery to actually permit their registration is a precondition for the use of the structure.

The encouraging developments in the field of co-operative education in schools and colleges and the useful work of the Scottish and Welsh devolved Governments do provide a basis on which increased visibility for UK co-operatives might be built. However, further UK wide co-ordination of these efforts would be helpful.

At European level, the availability of freedom of establishment rights across the internal market for any business organisation properly based in any Member State may make the approximation of national co-operative laws less urgent. However, the absence of the kind of approximation that has been applied to company law, leaves open the risk of a "race to the bottom" to the extent that co-operatives could choose their place of registration from among all the Member States.

The closely grounded nature of co-operatives and their relationship with their members may make this less likely than in the case of companies. However, it is possible to

envisage, for example, a co-operative with consumer or service providing members from many Member States mainly linked by electronic communication choosing between national laws if it wished to register either an SCE or a co-operative using national law.

The vital requirement across the whole of Europe is to safeguard co-operative identity and avoid the misuse of the "brand" while facilitating freedom for co-operatives to use a diverse and imaginative range of structures so as to develop in innovative ways to meet new needs in the market place. The SCE has its place in this endeavour and the aid of the European Commission to encourage such developments will help to ensure the continued success of the cooperative form of business structure throughout the continent and its contribution to the innovative and competitive nature of European business.

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