

COOPREFORM

**Framework for Cooperative
Legislation**

by

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Symbols used

- ☒ Optional rules (a rule which may be included in the law without it being compulsory)

- ☐ compulsory rule (a rule which, in the author's opinion, should necessarily be part of any co-operative law)

- ! Important point to take into consideration when writing a co-operative law

- ☐ Possibility to choose between different options of a compulsory or an optional rule

- ☐ Recommendation of the author

1. Introduction

The Recommendation No.127 of the International Labour Organization (ILO), adopted in 1966, is to date the only universal instrument concerning the role of cooperatives in the economic and social development of developing countries. According to this text, a cooperative society is Δ an association of persons who have voluntarily joined together to achieve a common end through the formation of a democratically controlled organization, making equitable contributions to the capital required and accepting a fair share of the risks and benefits of the undertaking in which the members actively participate; \textcircled{a} (paragr.12.(1) lit.(a)).

According to the Statement on the Cooperative Identity, adopted by the International Cooperative Alliance (ICA) in 1995, a Δ cooperative is an autonomous association of

persons united voluntarily to meet their economic, social, and cultural needs and aspirations, through a jointly-owned and democratically controlled enterprise."

The gap between the principles which underlie these definitions and reality is, in many cases, considerable. This is the reason why a great number of governments are currently undertaking reforms of their cooperative system, within the framework of political, social and economic restructuring. Insofar as the law provides institutional support to these different structural adjustments, cooperative legislation is also the object of revisions, the objective being the promotion of a harmonious development of authentic cooperative systems.

The international community supports this reform movement through financial, material, scientific and technical support by governmental or non-governmental regional and international organizations.

The ILO, according to Article 12 of its constitution, has been furthering the development of cooperative societies since its inception. The meeting of experts on cooperative legislation, organized by the ILO in 1995 underlined the urgent need for reforms of cooperative legislations.¹

A specific programme, i.e. COOPREFORM, was initiated in 1993 under the ILO-DANIDA programme on cooperative development in rural areas. This programme supports ILO member states in revising cooperative policies and legislations. The present document comes under this programme which intends to produce a series of manuals dealing with different aspects of cooperative reform.

These guidelines aimed primarily at the legislator, include an inventory of the matters to be considered, decisions to be taken and consequences thereof and, finally, the problems that may arise. It is however, not a recipe to follow. By choosing to design guidelines, the ILO deliberately put aside the idea of proposing a model law. Among the many reasons which have in the past contributed to making cooperative legislation in many countries ineffective, the consequences of an excessive mimicry stand out. Experience shows that laws mainly inspired by foreign ideas have often ended up as phantom laws.

The writing of a standard law always presents the risk of transforming itself merely into a simplistic transfer of legal concepts without adapting them to the national particularities. Guidelines, on the other hand, inspired by universally recognized cooperative principles, guide the legislator in constructing a cooperative law which respects the local context. This is necessary if the new texts are to be applied efficiently. Thus, the approach chosen here responds to appeals from the international community soliciting cultural diversity.

¹ See: Meeting of Experts on Cooperative Law, Final Report, Geneva: ILO 1996 , p.18

Even though the legislator is free to adopt the text it judges most adequate, it must nevertheless keep in mind the culturally determined economic, social, political and legal framework of the country. The cooperative law is thus only one of the elements of a system where cooperative principles, certain ideas on political and economic issues and the cooperative law reciprocally stabilize and complement each other.

The reality of the meeting of different cultures and the emergence of what one could call universal values must also be taken into consideration. The recognition of the key role women play in the process of development is an example of these unavoidable dimensions which influence cooperative praxis.

It is thus up to the legislator to find a middle road between the respect for the national heritage and insertion into the global system.

2. Framework of cooperative legislation

0.1. Cooperative principles

The ILO and the ICA, the only two universal organizations which promote the development of cooperative societies, have elaborated the following cooperative principles.²

- X voluntary open membership within the limits of the social objective defined in the bye-laws of the cooperative society in question and the right to freely withdraw.

The interpretation of the open door principle, i.e. negative and positive non discrimination as regards gender, social origin, race, political affiliation or religion must take into account the associative character of cooperative societies. The free will of the members to work together constitutes one of the keys of their motivation. This is incompatible with any attempt to impose members.

- X self-determination (i.e. self-help, self-administration, self-responsibility) and democratic control (one member = one vote).

- X economic contribution as a condition for membership and equitable participation in the economic results independently of the amount of capital invested.

- X limited interests on capital (de-emphasized role of capital).

- X education, training and information.

- X identity principle (the members co-finance, co-own, co-administer, co-use and co-control their cooperative society).

- X service to the members and concern for the community.

The ICA added this last principle of concern for the community during its Congress, held in Manchester in 1995. This does not mean that the debate on the question if cooperatives should exclusively serve their members or if they should also serve their communities is re-opened because nothing prevented the members of a cooperative in the past from working in a voluntary manner in favour of their community

According to the cooperative ideal, the well-being of the community stems from that of the members of cooperatives. Nevertheless, questions linked to the quality of life, such as the dissipation of natural resources, the non-mastering of certain technologies and the growing anonymization of decision making procedures etc. require that the interests of the members of cooperatives be constantly redefined.

Whether emanating from the ICA or the ILO, these cooperative principles do not legally bind the legislator. The ICA is a non-governmental organization whose decisions cannot be

² See the above cited ILO Recommendation 127 and the ICA Statement on the Cooperative Identity,

imposed upon states, and the ILO recommendations do not have the mandatory character of its conventions. This explains why these principles, elaborated on three decades ago were not always respected. However, with the absence of the ideological divide of the world attitudes have changed, and many countries now consider themselves more at risk by not adhering to universally agreed principles. The cooperative movements benefit from this evolution even though, at the same time, forces aim at limiting the margin of their autonomy through cooperative legislation.

Undoubtedly international and regional, governmental and non-governmental cooperation in cooperative reforms is working in favour of a universal consensus on these cooperative principles. An international customary cooperative law is emerging. Thus, a country which does not respect the principles established by the ICA and the ILO, not only risks losing the support of these organizations and, consequently, that of others, but it also risks losing the possibility of remaining or becoming a member of these organizations.

0.2. Socio-economic, political and administrative factors

In order to thrive, cooperative societies need a favourable political framework. The current development model is based on economic and political freedom. Being democratic, the state must ensure the respect for human and civil rights, the rule of law, the free choice of one's economic activity, free access to national and international markets, private property as well as a clear distinction between the public and the private sector according to the principle of subsidiarity.

Apart from exercising the functions of registration, deregistration and general normative control, the state in a market economy must not interfere in the economic affairs of private agents and must maintain favourable conditions for their development.

This statement needs three clarifications:

- (i) This type of relationship between the state and cooperatives in a market economy is not cooperative specific. It determines the legal nature of the cooperative law and restrains the possibility to grant cooperatives preferential treatment.
- (ii) After decades of interference in the affairs of cooperatives and in times where the living conditions of disadvantaged people in a number of developing countries are further deteriorating, the state must not withdraw completely and instantly.

For new and genuine cooperatives to develop without hindrance, cooperative policy needs to be complemented by a policy of disengagement of the state and of promotion of cooperative societies. The first should be conceived and applied alongside the cooperative policy as such, because of its temporary and subsidiary character.

The birth of an authentic cooperative movement can only become effective once the old system has been discharged. The redefinition of the role of cooperatives must be accompanied by a fair redistribution of the assets and the debts of the dissolved or restructured societies, taking into account, in particular, the responsibility of the state in the past errors while preserving the interests of the creditors.

The gradual transfer of tasks to the cooperative movement means that government personnel will have to be retrenched. The state will have to take into account the problems related to this.

It goes without saying that the application of these necessary measures should be dealt with case by case, associating the persons concerned with the decisions.

- (iii) It would be an illusion to think that modern market economy needs only a simple political and legal structure. Quite on the contrary, it can only function thanks to a highly complex political and legal structure. The balance between non-intervention and a policy of laissez-faire, which would be destructive in the long term to the system as a whole, can only be maintained by a complex law. The law must induce maximum participation of private agents who should have the essential decision making power in economic matters. With regard to cooperatives, this implies the impossibility for decision makers to convert cooperatives into transmission belts for national policies and, in particular, for policies accompanying structural adjustment.

The private character of cooperative law should thus prevent cooperatives from being used as instruments for political, developmentalist, social or other goals. Any such use of cooperatives endangers their economic efficiency.

This necessary redistribution of roles between the state, the cooperative movement and other private actors might be facilitated by setting up a national council for cooperatives which could reconcile state sovereignty with the independence of the cooperative movement. Conceived as a forum, this council would in no case take on a mission of tutelage.

The application of a policy of non-intervention in the economic activities of the private sector depends essentially on the organization of the politico-administrative system and the willingness of its office holders.

Thus, to the extent the constitutional system permits it, decentralization and deconcentration should be favoured, so that decisions can be taken and applied at the local level where cooperatives mainly operate.

The administration of cooperatives by the state must be as restrained as that of the private sector in general. Thus, for example, one single register for companies and cooperatives could be envisaged.

Cooperative administration by the state is required to ensure the good functioning, at all levels, of the tax administration, of the judiciary, of the banking system, the insurance system and the promotion of chambers of commerce, industry and agriculture. These institutions are all necessary for the good functioning of cooperatives as of other enterprises.

In theory, the administration is only an instrument in the hands of the government. Frequently, however, administrators acquire a certain independence, going as far as to oppose changes in orientation. The situation of the employees of the old state and parastatal structures in charge of the control of cooperatives is particularly delicate since the passage to market economy brings about a real revolution in their domain. The transition from a more or less direct intervention in the management of dependent cooperatives to the necessity to recognize cooperatives as independent structures by applying more subtle rules, requires flexibility and qualifications which administrators have not always been prepared to exercise.

0.3. The systemic nature of the cooperative law

The cooperative law is part of cooperative legislation. The latter is constituted by all normative, administrative and judicial acts having an influence on the formation, the organization and the operation of cooperatives. Thus, the rule on the non discretionary and non discriminatory exercise of administrative power and on the justiciability of all public acts, constitutional and administrative norms, rules on local and regional administration, real estate and private law in general, irrigation, water, investment, commercial law, company, tax, competition, labour, bankruptcy, and credit laws, regulations on imports, exports and pricing, on contracts, inheritance, accountancy, banking, consumer protection and social security, transports and marketing, etc. all form part of cooperative legislation.

The effectiveness and efficiency of the cooperative law therefore depends on the whole legal system. When drafting the law the legislator must therefore make sure that other legal provisions do not run counter to his project. It will be particularly important to be vigilant regarding the provisions contained in social and labour laws, marked by the wish to guarantee minimum social protection and to re-establish a balance between unequal partners, something which is at times incompatible with the freedom of private agents. Failing which, the self-determination of cooperatives might be in danger.

This approach requires resorting to a legal expert who looks after the compatibility of the different texts. In general, the ministry of justice supervises the harmonization of the laws.

3. Cooperative legislation

0.1. Why a cooperative law?

! In certain countries, such as Denmark and Norway, cooperative movements prosper without being ruled by their own *law*. But there are no cooperative movements prospering without cooperative *legislation*. Two main reasons may be given:

1. The existence of a cooperative law is a necessary but not a sufficient condition for getting a cooperative policy to work. The rule of law is a fundamental element in the new approach to development which emphasizes the respect for human rights. This presupposes that the legal relationship between citizens and the state is founded on acts of parliament. International cooperation uses law, in an ever increasing manner, as a means of information and communication. Law is a reference point and a guide mark.
2. In complex societies where social control can no longer be based on close relationships, law has proven to be the most adequate means of regulating the activities of economic agents who are not personally linked to each other.

For example, law establishes the criteria for the definition of legal persons, which gives physical persons the possibility of avoiding personal, financial liability.

The duality of law is apparent here. It represents the just balance between the autonomy of the cooperators and the cooperatives on the one hand, and the scope of normative control by the state on the other. At the same time, law is the instrument which establishes this balance.

0.2. The nature of cooperative law

The answer to the question of whether we are in the realm of public or in the realm of private law and whether mainly externally provoked accelerated development requires a specific law, defines the kind and scope of issues to be dealt with in a cooperative law.

0.2.1 Public law or private law?

The legal nature of the cooperative law depends on the definition of its object. If cooperative legislation is to regulate the activity of the cooperative sector, it will be part of public economic law and should include besides rules on the formation, structure, operations and dissolution of cooperatives, rules on a tutelage authority and its powers. If, on the other hand, it is only a question of proposing to potential cooperators a mode of organization, one finds oneself in the domain of private law.

The insertion of the cooperative law in one or the other of these fields reflects a political choice. In the context of structural adjustment, private law is the logical choice since the legislator is not seeking to interfere in the activities of cooperatives. In accordance with ILO Recommendation No.127 (paragr.10 (a)), the law thus offers cooperators a legal framework which will permit them to develop their activities in an autonomous manner.

0.2.2 Development law?

The history of cooperatives has been frequently marked by their being used as instruments to serve the development goals of the state, be it socialist or capitalist.³

Guided by the theories of development of law and of law of development, the management of the cooperative sector by the state, originally meant to be provisional, often became institutionalized. Public funding has brought about tighter control, thus closing the vicious circle of government involvement and a growing dependence of the cooperative system on the state.

No longer masters of their destiny, cooperatives have seen state officials survey their formation and operations, define their activities or organize their vertical integration.

More concretely, the formation of cooperatives has often been characterized by:

X the obligation to limit their activities to a specified territory, coinciding more often than not with the boundaries of administrative districts.

This obligation, allegedly for the sake of cooperatives' economic efficiency and control by the government, not only contravened the freedom of the cooperative movement, but it also contributed to its politization. By the same token, the positive effects of competition on economic efficiency were excluded.

X compulsory membership

Not only did individuals lose the possibility to constitute themselves freely as cooperatives, but they were, furthermore, obliged to join structures established at the place of their residence.

Once these interventions were accepted, the interference would not stop there. State administration intervened in the management of cooperatives more or less directly. For example, it

³ One may cite as an example the "British-Indian pattern of cooperatives" and a number of laws on pre-cooperatives.

- X organized general assemblies (GA) to establish cooperatives; sometimes it simply created cooperatives ex nihilo;
- X held ordinary or extraordinary GAs, meetings of the board of directors and of other organs, by delegating state representatives to sit in these sessions, which sometimes had been convened directly by them;
- X took decisions normally made by the organs of the cooperative.

The personnel, elected or employed, found themselves under close supervision, regarding their selection, their remuneration and their eventual replacement at times by state commissioners.

Practically without a say in defining their field of activity and their internal functioning, cooperatives were often

- X excluded from certain sectors, saw themselves assigned pre-determined objectives, and even the services to be provided to their members and users were the object of external decisions;
- X deprived of the choice of their activities, they were not free to dispose of their resources. Loan, investment, and even decisions on the distribution of a surplus had to be submitted for approval. Supposedly inefficient management could be sanctioned by freezing the cooperative 's bank account.

To this a priori control, the administration would add an a posteriori control by auditing the cooperatives directly or having them audited.

Not only did the administration interfere in the day-to-day management of primary cooperatives, it also arbitrated the relationships between the different levels by

- X creating and running secondary and tertiary cooperative organizations;
- X fusing and dividing such structures; and
- X settling disputes without there being any possibility of an appeal to ordinary tribunals.

On the other hand, cooperatives were allowed privileges in matters of taxation, access to credit or state controlled support.

Such constraints and privileges can no longer be part of cooperative law. They are incompatible with it belonging to the private law. Moreover, the law should regulate existing social activities and not try to give birth to them.

Past experience with the above mentioned theories of "development of law" and "development law" have not proven satisfactory. The legislator will, however, have to

respect the implications of the human right to development, foremost by allowing for cultural diversity within the limits of cooperative principles.

0.3. Which instrument?

The autonomy of cooperatives will only be achieved by respecting the principle of subsidiarity. Originally conceived to promote vertical delegation of central state power, this principle calls for each cooperative to be the master of its own decisions unless these are of public concern or involve third party interests.

In this context the bye-laws of cooperatives and their internal regulations have a primordial role. Their elaboration contributes to strengthening the motivation of cooperators and thereby reinforcing the capacity of self-management. Only matters which surpass the competence of an individual cooperative may be regulated through norms, ranging from the constitution and laws, to decrees and other administrative acts.

According to the rule of law, questions relating to cooperative principles must be regulated by law, whereas decrees or other administrative acts will operationalize the law.

Provisions of a temporary nature or those which are subject to frequent changes, such as rules on fixed interest rates, should not be inscribed in the law.

Once inscribed in the law, a rule cannot be cancelled unless there is a revision of the law. Similarly, a text of any nature cannot nullify clauses contained in other texts of the same order which existed prior to the new legislation. This explains why the systemic character of cooperative law should always be kept in mind.

0.4. One cooperative law or several laws?

Considering the diversity of self-help organizations in terms of activity, number of members, level of development, needs, their degree of inter-relatedness with competitors and other business organizations and the existence of several types of cooperatives (producers', service, consumer cooperatives) in all economic sectors, be they single- or multi-purpose cooperatives, the legislator will have to decide whether to pass one single law catering for their different aspects, possibly containing specific chapters for particular cases, or whether to pass several laws.

It is even possible that the civil code, the company law and/or other fields of law make a specific cooperative legislation superfluous.

As already mentioned however, in no event may the legislator allow for essential matters to be regulated through administrative acts, by stipulating in excessively general terms.

Taking into account the advantages and inconveniences of the different alternatives, resorting to a single law including, if necessary, specific chapters dealing with particular types or activities of cooperatives, seems to be the best solution. It.....

- X guarantees the autonomy of cooperatives because of its inevitably general character;
- X reduces bureaucracy;
- X favours the unity of the cooperative movement; and finally
- X guarantees legal security for those dealing with cooperatives.

0.5. Language of the cooperative law

It is not unusual that the primary addressees of the cooperative law neither master the official language in which the text is written, nor understand the legal terminology.

The promulgation of the law in vernacular languages, the use of an accessible style or the adoption of a law that one can understand without having, in as far as possible, to resort to other texts, are some of the means to improve access to the cooperative law. However, the cooperative law must not be an exception. Its language must be consistent with that of the other legal texts so as to ensure the uniformity of the legal system.

- ! Unless one wants to instigate a revolution at the level of the language of the law, an understanding of the law, a prerequisite for its acceptance, must be reached by thorough popularization which is not a simple question of translation.

0.6. Format of the cooperative law

The format of the cooperative law might seem of secondary importance. Nevertheless, it must be noted that form and content are one.

A brief law, defining an organizational framework for cooperatives only, necessarily refers to other provisions, making it less intelligible and therefore relatively difficult to apply. From a practical point of view, a detailed law thus seems preferable. However, such a text risks impeding the autonomy of cooperatives by limiting notably the role of their bye-laws. On the other hand, it prevents the excessive resort to administrative decisions.

The dimension of time has to be taken into consideration as well. Very often cooperative laws have been marked by too detailed texts which become inapplicable because of frequent political changes.

0.7. An ABC of a cooperative law

Starting with their formation and ending with their dissolution cooperatives are subject to legislation. Their internal functioning as well as their dealings with third parties have to be regulated.

As a rule, the bye-laws recapitulate and specify the main points of the law and relevant administrative acts.

The following main topics of a cooperative law will be presented here:

Contents of a cooperative law		
Y	Preamble;	
Y	General provisions;	
Y	Formation, registration and publication;	
Y	Obligations and rights of members;	
Y	Organs and management of the cooperative society;	
Y	Capital formation, accounts and distribution of results;	
Y	Audit;	
Y	Forms of dissolution;	
Y	Simplified structures;	
Y	Vertical integration;	
Y	Dispute settlement:	
Y	Miscellaneous, transitory and final provisions.	

0.7.1 Preamble

- If the legal system of the country permits it, the cooperative law could contain a preamble, possibly alongside a clause in the constitution or a policy declaration on cooperatives.

This preamble could be the opportunity for the legislator to expressly renounce previous policies.

Its legal nature must be clear.

The preamble could indicate the following:

- X the role and the function of cooperatives in the society in general and in the economy of the country in particular;
- X the character of cooperatives as private and autonomous organizations having access to all lawful activity;
- X the limited intervention of the government regarding the formation and promotion of cooperatives;
- X equal treatment of cooperatives with regard to other business organizations, i.e. no positive⁴ nor negative discrimination in order to avoid the formation of bogus cooperatives as well as distortions between competitors .

The economic relationships between cooperatives and the state must therefore, except in special cases, be based on private law contracts.

In summary, the preamble will define guidelines for the interpretation of the law, which are all the more important where genuine cooperatives are not yet solidly implanted⁵.

0.7.2 General provisions

0.7.2.1 Definition of cooperatives

In spite of the widespread abuse of the term *cooperative* in the past, it should not be replaced by another term. It helps to differentiate between cooperatives on the one hand, and capitalist or non-lucrative organizations on the other.

The law must define precisely what a cooperative is by distinguishing it from other possible forms of self-help organizations. This helps:

⁴ This goes beyond the text of ILO Recommendation No. 127.

⁵ The project for harmonizing cooperative legislations in South America (Proyecto de Ley Marco para las Cooperativas de América Latina, elaborated by the Organización de las Cooperativas de América (OCA) could be a valuable source of ideas concerning the preamble and the general provisions.

- X to guide the administration in the carrying out the normative functions of the state;
- X to distinguish genuine cooperatives from false ones;
- X to determine the rights and obligations of the members, as well as those of its organs;
- X to specify the qualifications and duties of cooperative officers concerning capital management and serving the interests of the members;
- X to state minimum rules concerning accountancy and audit, furthering the efficient use of financial and human resources;
- X to resolve the conflicts that might arise between cooperative law and labour law or between cooperative law and competition law;
- X to establish criteria for the taxation of the members and/or the cooperative;
- X to regulate the relationship between private and public entities according to liberal principles;
- X to facilitate the evaluation of the economic, social and political impact of cooperatives;
- X to promote international cooperation between cooperatives.

Certain laws have acquired over the years the status of a model, such as:

- ≡ Section 4 of the 1912 *Indian Cooperative Societies Act*;
- ≡ Article 2 of the French application decree n (55-184, dated 2 February 1955);
- ≡ Section 2 of the 1970 *Zambian Cooperative Societies Act*;
- ≡ the 1977 *Sierra Leone Cooperative Societies Act*;
- ≡ Section 2 of 1991 *Tanzanian Cooperative Societies Act*;
- ≡ Article 8 of the 1992 Cameroon Law relating to cooperative societies and common initiative groups.

Rather than taking a definition formulated under different circumstances, it is better to formulate a new one rooted in the local context whilst paying respect to the universally recognized cooperative principles.

The text must however remain pragmatic. Cooperative principles and ideals do not as such constitute a law which is able to guarantee the main objective of cooperatives that is to serve members' interests.

The definition of cooperatives will also depend on the legislator's choice between a single law governing all types of cooperatives and several specific laws. Whatever the choice may be, the definition must take into account the dual nature of cooperatives. They are both associations and business enterprises.

- ! More precisely, they are not enterprises in the true sense of the term, but associations of persons, who, working towards common objectives, have decided to become owners of a joint enterprise. Although this enterprise must be run in a profit oriented way, it is distinct from capitalist enterprises in that it is oriented towards its members' interests and not towards its own interests. The specific cooperative way of cost calculation and profit distribution, requires the use of the term "surplus" instead of "profit".

The fact that cooperatives are often described, even in legal texts, as non-profit organizations, must therefore not lead to false interpretations. They exercise a potentially profitable economic activity.

- ! It must also be remembered that this definition of cooperatives is not limited to primary cooperatives but that it also applies to secondary and tertiary cooperatives if they are allowed to carry out an economic activity.

Finally, considering the number of groups and organizations based on self-help, mutual aid or solidarity, those structures *which do not* come under the cooperative law could be listed, especially if they are regulated by special laws.

0.7.2.2 Cooperative principles

The universally recognized cooperative principles may be included in the preamble or in the definition of the cooperative by listing them or by making reference thereto. A reference has the merit of being more flexible and of not imposing a revision of the law should the principles change.

In return, a reference to external sources makes the application of the law more complicated, not to mention the risk of false interpretations. As long as the cooperative principles are not established as legal norms, this risk must however not be overestimated,

Another solution is to draw up a list of the cooperative principles, taking care not to grant it a limiting and definite value.⁶

0.7.2.3 Definition of the terms used in the law

⁶ This could be translated by the use of expressions such as "among others, ..." or "in particular ...". Thus the reference would include possible changes.

A glossary of the legal terms used in the law could be included in the text, annexed or contained in a separate document. This is all the more necessary where this kind of law is new or marks a sudden change of politics, or where a single general text replaces several more detailed ones.

Such a glossary would also have the merit of facilitating communication at the international level.

0.7.3 Formation, registration and publication

0.7.3.1 Formation

Membership qualifications

According to western legal concepts, only physical and legal persons may hold rights and hence be members of a cooperative.

This definition is based on a cultural assumption which individualizes physical persons. European culture defines men and women as individuals. Other societies are organized on the basis of extended families or even larger groups as individuals. These entities may be admitted as members in cooperatives provided they have a stable structure. One would have to make certain, however, that the decision making procedure within the cooperative is not affected by admitting such groups as members.

Such provisions might even facilitate the functioning of the cooperative by permitting it to respect the decision making procedures of the existing social environment, notably in matters of management of natural resources.

As a rule, legal entities are not members of primary cooperatives, except sometimes in the case of service cooperatives. There are, however, no legal objections to them being member as long as the democratic principle *one member - one vote* is respected.

Number of members in primary cooperatives

☒ In order to respect the freedom of association, restrictions on the number of members of a cooperative should be limited. Some legislations require that the number of members be at least three. The economic viability of cooperatives with too few members is, generally speaking, precarious. Under such conditions, granting them legal personality might go against the interests of their potential partners and creditors.

! The experience of a country might require that different minimum numbers be fixed according to the types of cooperative. Thus this number might be higher for consumer cooperatives than for producer cooperatives, the number for service cooperatives falling somewhere in between.

Restrictions concerning age

- ☒ The admission of legal minors is generally an exception to the general civil law of the country. The possibility for minors to affiliate themselves to a cooperative needs careful studying of the implications in terms of financial responsibility, the right to vote or the eligibility to posts of responsibility.

In order to hinder that joining a cooperative becomes a means of access to a level of social responsibility for minors, which would not legally be accorded them individually, their number and prerogatives must be limited. Notably, minors must be prevented from being able to control the cooperative.

0.7.3.2 Registration and publication

The recognition and thus the protection of cooperatives by the state manifests itself in the registration of its name and all other information justifying its status as a legal person in a public register.

Noting what has happened during the last decades in a number of countries, it appears that the law must foresee severe sanctions against any abuse of the name `Àcooperative@`.

Types of registration

There are two types of registration: the quasi-automatic registration and the registration after approval by a public authority.

According to the first option, which appears to be most suitable in a liberal and democratic environment, a cooperative *must* be registered once the conditions stipulated by the law are fulfilled.

If, on the other hand, a previous approval is necessary, the discretionary power of the approving authority must be strictly and effectively limited.

Registration authority

The separation of state powers, the legal nature of the law, the definition of cooperatives, or the use of the registration procedure as a means of control, are elements to consider when choosing the registration authority.

Recognition of cooperatives as economic organizations of the private sector would permit having all types of enterprises registered in one single register. Even though registration is an administrative task, it could be exercised by the judiciary.

The legislator has to ensure that the registration be conceived as a local service.

Registration procedure and conditions

In no case must the registration procedure hinder citizens from forming groups in the way which suits them best.

No registration will be made without a request from an elected re-representative of the nascent cooperative. This request must be filed within a brief time limit, fixed by law, after holding of the constitutive general assembly.

Documents to be attached to the application for registration

Y the minutes of the constitutive general assembly, with the signatures or finger prints of all founding members. If the bye-laws were adopted on the basis of model bye-laws, the minutes must document a detailed discussion of these model bye-laws;

Y a sample of the signatures of the persons with the right to represent the cooperative;

Y several copies of the bye-laws with the signatures or the finger prints of all founding members;

Y the list of the members with their names and addresses as well as their date of admission. These data are important when one has to determine the financial responsibility of each member. This list must be kept up-to-date and all modifications must be notified to the registration authority;

Y the report of an economic feasibility study concerning the future activities of the cooperative as well as an evaluation of the qualifications of the managers. This study should be carried out by a union or federation of cooperatives. Where there is not yet a vertical cooperative structure in place, an authority, which is independent from the registration authority, may temporarily carry out this task.

The objective of these measures is not to hamper the freedom of cooperatives, but to see to the interests of their members and their potential business partners, since the risks these are running are greater than those usually permitted for other types of enterprises. This is mainly due to the generally weak capital base of cooperatives. The legislator must, however, refrain from such preventive measures if it cannot exclude abuses of power in connection with this study;

Y a proof that the cooperative will be properly audited by a qualified auditor;

Y a list of the persons entitled to file the application for registration and to notify all subsequent changes to be made to the registry;

Documents to be attached to the application for registration

Y a document showing that at least half of the total amount of the cooperative shares has been paid up and stating the period of time within which the remainder must be paid.

Registration procedure

- ! The implementation of a speedy and impartial registration procedure is the first step by the state towards facilitating the development of a genuine cooperative movement. To this effect, the following procedure is proposed:
 - X a deposit receipt stating the application for registration, duly signed and dated, will be given upon presentation of the above-mentioned documents;
 - X registration will be made within a short time limit. One certified copy of the bye-laws, mentioning the number and date of registration, will be given to the cooperative. It will be proof of the official recognition of the cooperative as a legal organization;
 - X a refusal to register must be justified in writing and notified to the group that requested registration;
 - X in the case of such a refusal, the cooperative may appeal before a court (to be specified) which will give a decision within a stipulated and brief time limit;
- ! X if within the required time limit, no refusal has been notified, or if the court has not given its decision, registration will be presumed. This will be implied by notifying, within a fixed and brief time limit, a certified copy of the bye-laws indicating the number and date of the presumed registration to the cooperative;
- ! X whichever type of registration is chosen, it must be published within a fixed and brief time limit by means of an easily accessible medium generally used by the local authorities. In case it is not published within the time limit set, the cooperative will be considered as such and the person not having fulfilled his duties will be financially responsible for the consequences;
- X the fees for the registration and publication must in no case be prohibitive.

The registration only becomes effective with its publication. This is why cooperatives may demand that the time limits be brief and respected by the registration authority.

Only published information is binding on third parties. After registration, cooperatives must therefore make sure that any subsequent changes in the registered data be notified to the registration authority, failing which, the persons not having fulfilled this duty will be held financially responsible for the consequences.

Nature and effects of the registration

By registering and publishing, the state acknowledges the legal status of the cooperative. This signifies that the cooperative is responsible as a legal entity, independent of the members of which it is composed.

The members will not be, for example, individually responsible for any acts performed in the name of the cooperative.

As a legal entity, the cooperative has rights and duties. It can acquire property rights, contract debts, develop an economic activity and be party to law suits. As with companies, this legal capacity will be infinite or limited by the objective of the cooperative concerned.

It thus appears that the attribution of the status of legal entity is not compatible with the frequently used formula according to which cooperatives were *the mandatories of their members*. Once a cooperative is registered, acts performed on its behalf exclusively commit the cooperative.

The status of acts performed on behalf of the cooperative during the period from its constitution until its registration, must be clearly defined.

The granting of the status of legal entity is, as a rule, motivated by the wish to favour the participation of private persons in joint economic activities since these are judged to be more viable. The fact that their personal responsibility and, in particular, their financial responsibility is not committed, is certainly an encouraging factor for people to become members of legal entities.

One might object that the distinction made between the organization and its members contradicts the cooperative principle according to which the cooperative may not be dissociated from its members. Other than in a company, the capital of a cooperative varies with the number of members. In the interest of third parties, the constitution of a legal entity, independent of its members, is therefore indispensable.

In order to favour the rapid development of cooperatives, which is justified by the economic situation in numerous countries, most of the legislations adopted during the 1960s provided for the possibility of provisional registration of mainly *pre-cooperatives*.

! After thirty years of experience, one must admit that most of the pre-cooperatives have not evolved towards the expected autonomy. Rather to the contrary, their dependence on the

state increased as a result of ever growing support and control, discrediting thereby the role of the state as promoter.

In addition, provisional registration gave birth to considerable confusion, especially among banks and other potential creditors with whom it was supposed to facilitate relations, because the legal nature of a provisional registration remained unclear.

0.7.3.3 Admission

Principle

Within the limits of the objective of the cooperative in question and according to the open-door principle, all persons who make the request should be admitted. The associative character of the cooperative must, however, permit the members to have a say. Mutual acceptance by the members is a *sine qua non* for the success of the cooperative.

The residence of the applicant should not hinder his or her admission unless the objective of the cooperative has proximity as one of the keys for its success, in which case the by-laws could foresee the necessary clause.

A good number of cooperative legislations permit the exclusion from membership of persons who do not have a clean police record. Unless the punished behaviour is likely to harm the cooperative, the members should assume their general social duty by helping to reintegrate such persons into society.

The policy adopted in matters of capital distribution also has an influence on the number and quality of the members. The risk of membership applications motivated by the search for a lucrative investment may be avoided by not distributing the benefits drawn from transactions with users or by reimbursing shares in the event of resignation or liquidation at nominal value only (Cf. 3.7.4.2).

Admission procedure

Given the associative character of cooperatives, the admission of new members must be, *in fine*, decided by the general assembly. For practical reasons the board of directors may decide but the GA will keep, if it wishes so, a right of confirmation or veto, to be exercised during the first meeting following the decision taken by the board.

In order to be able to determine with certainty the rights and obligations of the members, it is important to specify the act in the law which constitutes membership.

Applications for membership must be dated and confirmed upon receipt. A refusal must be justified in writing and the applicant must be notified immediately. The applicant must have the right to appeal to a court of law (to be defined). If the cooperative has not met the time limit set by the law, membership is presumed.

Maximum number of members

In theory, the open-door principle does not authorize any restriction in the number of members. In practice, the number of members must be compatible with the objective of the cooperative in question. Just as with the minimum number of members, it is difficult to define an upper limit.

One might note that, in general, the problems grow with the size of membership. The more members, the more difficult it is to maintain a democratic mode of administration, and the less members identify with their cooperative.

Decentralization by means of regional or assemblies by sectors (Cf. 3.7.5.1), combined with a more effective administration making up for the negative consequences, might mitigate this inconvenience without, however, making it disappear.

The problem varies with the type of cooperative. Thus the size of a consumer cooperative has little influence on the decision making process. Producer cooperatives, on the contrary, will most likely suffer if the size of membership outgrows certain limits.

0.7.3.4 Resignation

The right to resign must be guaranteed by the law which must see to it that an administrative act or the bye-laws of the cooperative do not have an adverse effect.

A resignation may be restricted until a minimum period of membership has expired, or be subject to discharging the obligations, essentially of a financial order, incurred towards the cooperative and third parties. These conditions must in no case be excessive, and the required time limit (for notification, reimbursement of shares, etc) must be reasonable.

The effect of the resignation is the postponed or immediate termination of the rights and obligations of the resigning member. Remaining, under certain conditions, financially responsible, the resigning member has a right to have his or her share reimbursed, in principle at nominal value. However, the cooperative must have the possibility to spread out the reimbursement if an immediate reimbursement would seriously affect its functioning. In this case, the cooperative will pay a limited interest (Cf. 3.7.4.2).

0.7.3.5 Exclusion and suspension

Given the open-door principle, an exclusion must be an exceptional measure. It can take place when members do not resign voluntarily even though they no longer fulfill the conditions of membership, if they seriously violate the bye-laws or if their behaviour is detrimental to the cooperative.

Depending on the kind of misconduct, the cooperative might decide a partial or total suspension of the rights of a member during a certain period.

In both cases, the member concerned must be heard and, at his or her request, the motives for the decision of the cooperative must be communicated to the member in writing. The member may appeal before the GA and/or a court of law.

The terms and effects of an exclusion or suspension are the same as those for a resignation.

0.7.4 The obligations and rights of members

0.7.4.1 Obligations

Principle

Membership is linked to rights, these being conditioned by the discharge of obligations. The law and subsidiary legislation must ensure that this rule is respected, even in cases where social rules tend to override these rights and obligations.

In no case, must the social mechanisms based on family ties, race, age, religion or any other affiliation to a group affect the independence and the equality of the members.

Personal obligations

By belonging to a cooperative, members commit themselves to:

- X respect the bye-laws as well as all the decisions taken in the general assembly, whether they voted for their adoption or not;
- X abstain from any activity detrimental to the objective of their cooperative.

Membership in several cooperatives having the same objective and territory must not automatically be considered as harming the cooperative(s).

- X participate actively in the life of the cooperative. This obligation may not, however, be enforced.

Financial obligations

Membership in a cooperative implies the following financial obligations:

- X Each member must subscribe to and pay for the minimum number of shares fixed by the bye-laws;
- X Each member is financially liable for the debts of his or her cooperative. This liability is at least equal to the amount of shares subscribed.

In order to compensate, at least in part, for the financial weakness inherent to most cooperatives, the law or the bye-laws may impose an obligation on the members to make supplementary payments in case the cooperative is unable to pay its debts. This may result in an unlimited financial liability of the members.

The amount of these supplementary payments may be the same for each member, it may be determined as prorata of the transactions made by each of the members, according to the method used to distribute the surplus, or according to the number of shares held by each member.

If not specified in the law, the type of financial liability of the members must be explicitly dealt with in the by-laws in order to protect the interests of third parties.

Because of the status of legal personality of cooperatives, this financial liability commits the members towards their cooperative only, and not towards the creditors of the cooperative. It extends beyond the termination of membership, during a period to be specified in the law. As a rule, a member must contribute to the discharge of only those debts which show in the balance sheet at the time of the end of his or her membership.

Other obligations

- ☒ One might envisage obliging the members to use, to a certain extent at least, the services of their cooperative. Although favouring in the short run the development of the cooperative, such a rule would in time have a negative influence on the competitiveness of the cooperative and it might violate competition law.

Rather than reasoning in terms of legal obligations, one might consider that cooperators have the moral duty to work with their enterprise. Furthermore, it is up to the cooperative itself to offer sufficiently attractive services to its members. In order to guarantee a certain stability in specific cases, the cooperative might have to conclude individual contracts with each of its members.

Furthermore, exceptions are possible particularly in the case where the members decide to make an important investment, the success of which depends on the members using that facility. Members could then temporarily be forbidden to look elsewhere for the rendered services.

0.7.4.2 Rights

Personal rights

Each member has the right to:

- X use the installations and services of the cooperative;
- X participate in the general assembly, propose a motion therein, and vote;
- X elect or be elected for an office in the cooperative;
- X obtain at all times, from the elected bodies of the cooperative information on the economic situation of the cooperative;
- X have the books and registers inspected by the supervisory committee.

Jointly as a group (minimum number to be determined), the members can also:

- X convene a general assembly and/or have a question inscribed on the agenda of that GA;
- X ask for an additional audit.

Financial rights

The members have the following financial rights:

- X They receive a share of the surplus in the form of a bonus, calculated as prorata of their transactions with their cooperative (patronage bonus), and/or a limited interest on the paid-up shares.
- X When terminating their membership, they can ask that the paid-up shares be reimbursed. Losses or devaluations may be deducted from the nominal value of these shares.
- X In the case of liquidation, members receive a share of the remaining sum, if any, unless the bye-laws stipulate that this must be credited to another cooperative or to a charitable organization.

0.7.4.3 Provisions relating to members employed by their cooperative

The employer/employee relationship in cooperatives has proved to be at times thorny when the employees are members of the cooperative, and consequently their own employers. Being at the same time judge and party, the members might find contradictory interests in terms of working hours, salary, trade union rights, etc. The problem presents itself at varying degrees of intensity in the different types of cooperatives:

- X in service cooperatives, it is unusual that members are employees of their cooperative;
- X in consumer cooperatives, the employees are generally members of their cooperative. However, the objective of the cooperative is not identical with that of the labour contract.

To hinder the interests of member employees from dominating, the voting rights of these members must be limited in cases relating to work conditions, or the GA must delegate its decision power in this matter to the board of directors.

Besides, member employees will avoid encroaching upon the interests of their employers since they are themselves their own employers.

- ! X in producer cooperatives the conflict is obvious. Here the substance of the labour contract is cooperatized, it is thus identical to that of the cooperative. With the exception of the rules on social protection, the labour law must not be applied in this case because the cooperators freely consented to organize their work according to cooperative principles.⁷

0.7.5 The organs and management of the cooperative

0.7.5.1 Principles

The functioning of cooperatives, other than that of companies, depends on the participation of the members who must be able to exert an effective influence on the business of the enterprise. Nevertheless, as a legal entity, the latter must be able to keep a certain independence which is the essence of its being granted legal personality.

The internal organization, the sharing of powers between the different organs, the elections to offices as well as all important decisions must reflect the will of all members, regardless of their financial contribution.

Every cooperative must have at least:

- X a general assembly (GA) and
- X a board of directors which may also be called management committee.

Although registration does not require the existence of a control unit, it is advisable to have one since cooperatives which have one seem to function better. This control unit, called *Asupervisory committee*, must be independent from the board of directors in order to be able to control the management on behalf of the members who often lack the necessary qualifications to do so themselves.

- ! This dual system does not replace internal control mechanisms of the board of directors such as internal auditors etc.

⁷ The ILO organized a meeting of experts on cooperative legislation in 1995 which dealt with this problem (Cf. Meeting of Experts on Cooperative Law, Final Report, Geneva: ILO, 1996 and Labour Law and Cooperatives, Experiences from Argentina, Costa Rica, France, Israel, Italy, Peru, Spain and Turkey.- Geneva: ILO, 1995).

- ☒ As for the optional post of manager, it is not an organ of the cooperative since its prerogatives are delegated from the board of directors.

0.7.5.2 General assembly

Composition

The ordinary or extraordinary general assembly (GA), composed exclusively of the members, is the supreme organ of the cooperative. Third parties who have invested in the enterprise may possibly participate in the GA, but they will not have voting rights.

An ordinary GA must convene at least once a year; an extraordinary GA may take place at the request of the persons entitled to do so according to the law or the bye-laws.

If the size of a cooperative in terms of territorial coverage or number of members is such that the necessary quorum is difficult to attain, regional assemblies and/or assemblies by sections may be formed. These decentralized assemblies elect their representatives to a delegates' assembly which replaces the GA. The agenda of these meetings as well as the mode of deliberations and voting will be decided at central level so as to guarantee the same standards throughout the cooperative. In order to reinforce communication between the different levels, the members of the board of directors and the supervisory committee should participate in the meetings of these local assemblies.

Powers

The dual character of cooperatives as associations and enterprises, is indicative of the way in which powers must be shared amongst the GA and the board of directors. According to the definition of cooperatives, the members use the enterprise to attain certain economic objectives. The management must have the necessary working margin which is indispensable for efficient management, whereas all decisions concerning the association must be taken by the GA.

Starting from this basic distinction, one may draw a list of the matters to be dealt with exclusively by the GA. These matters may not be transferred to any other body or person, not even by the unanimous decision of all the members. Among these powers the most prominent is the right and obligation to adopt, and if necessary, to modify the bye-laws within the limits of the law and cooperative principles.

The GA may stipulate on a matter through its bye-laws where the law is silent, when the legislator leaves it a choice amongst several options, invites it to specify legal provisions or when the cooperators decide to rewrite certain clauses of the law in order to make them easier to understand.

What has been said concerning model laws is, *mutatis mutandis*, equally valid for the bye-laws. The adoption of model bye-laws recognized by the authorities, makes registration

easier because of their supposed conformity with the law. Their adoption must, however, not be made compulsory.

Contents of bye-laws

The bye-laws *must* contain:

- the name and the trade name of the cooperative, which may be freely chosen, as long as there is no confusion possible with the name of another cooperative already registered and as long as the public is left in doubt about the limited financial liability of the members;
- the locality of the head office, its postal address and possibly the conditions for a transfer;
- the definition of the objective (including the indication of whether the cooperative is a single or a multi-purpose cooperative);
- the conditions and procedures for admission, resignation, exclusion and suspension of members as well as eligibility criteria. These must reflect the particular character of the cooperative in question, as also reflected by its being a primary, a secondary or a tertiary cooperative;
- the value and minimum number of the shares to be subscribed by each member. The GA ensures that the economic means of the least affluent members form the basis for the decision;
- the procedure and conditions for the subscription and payment of the shares and, possibly, of additional shares. Shares may be paid in cash, kind, labour, service or by leaving the share of the surplus, to which a member is entitled, with the cooperative;
- the type of financial liability of the members for the debts of the cooperative
- the administration of the registers;
- the conditions and procedures for convening GAs (form of notice, fixing and notifying the agenda, election of the president of the session, preferably not a member of the board of directors, quorum and voting, number of delegates by section or by region if any, etc.);
- the size of the board of directors and, possibly, of the supervisory committee; the conditions of eligibility to the various offices, the duration of the mandates and

Contents of bye-laws

their possible remuneration; rights and obligations of officers, mode of decision taking;

- the conditions and procedures for convening the board of directors and, if any, the supervisory committee (quorum, voting, etc.);
- financing: capital formation, constitution of the legal and of the statutory reserve funds;
- surplus distribution and contribution to cover losses;
- the distribution of the capital in case of resignation, exclusion or liquidation;
- definition of the financial year;
- auditing;
- conditions and procedures for voluntary dissolution;
- arbitration procedure;
- decision making;
- specification of any other legal matter; and finally
- the procedure for modifying the bye-laws.

Without being compulsory, the bye-laws *may* also include rules on:

- the duration of the cooperative;
- its area of jurisdiction;
- its affiliation to one or several secondary or tertiary cooperative organizations;
- the nature and volume of transactions possible with non-member users.

A balance must be found between the economic efficiency and the autonomy of the cooperative. This may translate into a definition of a threshold (percentage of total turnover) which the transactions with non-member users must not exceed. These transactions must be kept separately in the accounts of the cooperative;

- the reimbursement of the expenditures of the managers and other officers;

Contents of bye-laws

- ∨ the maximum number of additional shares per member;
- ∨ the formation of regional or assemblies by sections, decision making, voting and number of delegates to represent at the central level.

Issues falling under the exclusive competence of the general assembly

- ∨ the division of powers between the different organs according to the above-mentioned principles, and the adoption for each of them of an internal regulation;
- ∨ the election and the dismissal of the members of the supervisory committee and the board of directors unless the latter are to be chosen by the supervisory committee. The more powers the management has, the easier it must be to remove it from office.
- ∨ the distribution of surplus or loss;
- ∨ the amalgamation, the division, the transformation or the dissolution of the cooperative;
- ∨ the keeping of the minutes;
- ∨ the decision concerning the possible limitation in matters of loans, deposits or investments;
- ∨ the nomination of auditors, the duration of their mandate and their remuneration;
- ∨ the examination of the auditor's report as well as the annual report;
- ∨ giving or refusing the final discharge of managers;
- ∨ the adoption of the annual budget;
- ∨ the admission of new members;
- ∨ decisions in matters of education and training of members;

**Issues falling under the exclusive competence
of the general assembly**

- ∨ the extension of the duration of the cooperative;
- ∨ the decision on a professional manager, member or not of the cooperative;
- ∨ the possible creation of sub-committees with specific tasks, and the duration of their mandate.

Decision making

- ! **Quorum:** The conflict of principle engendered by the dual nature of cooperatives, must be solved by adopting a mode of decision-making which respects the principles of both democracy and economic efficiency. Fixing a quorum, i.e. the minimum number of members who must be present at the general assembly to validly deliberate and vote, constitutes such a compromise.
- ☒ This quorum, most often expressed either in a percentage of the number of members at the time of convening the GA or in an absolute figure, or in a combination of the two, may vary according to the topic on the agenda.⁸

Provision must be made for cases where the GA repeatedly fails to gather the required quorum. As a rule, a second meeting with the same agenda may decide regardless of the number of members represented.

Voting: The basic rule for primary cooperatives is "one member = one vote". This also applies to members being legal persons. Plural voting rights may be granted only exceptionally, in no case, however, on the basis of the amount of capital invested by a member. The volume of transactions with the cooperative or other criteria of the that type might be, under certain circumstances, used when allocating plural voting rights. They may, however, not be exercised when taking decisions on important matters as specified by the law. In no case must one single member be in a position to take decisions on his or her own. In secondary and tertiary cooperative organizations however, a system of plural voting rights may be applied without such restrictions.

The law must stipulate on the voting rights of delegates, i.e. members elected by sectional assemblies to the general assembly. The participation of non-member investors in the GA

⁸ see infra "Majorities"

will have to be regulated in a way as to ensure that they may not outweigh regular members.

For the above-mentioned reasons, the voting rights of member employees will also have to be restricted to exclude them from voting on issues related to their employment.

- ☒ If voting by proxy is considered, the proxy must be a member of the cooperative and should not represent more than two or three members. Voting by mail might be a way to involve the greatest possible number of members in the decision making process whenever the physical presence of the members is not necessary.

Generally ballots should be secret in order to limit the influence of certain members, mainly the president of the assembly.

Majorities: Generally decisions may be taken by simple majority if the required quorum of members is present. Resolutions concerning the Association contract, be it a modification of the bye-laws or a decision on an amalgamation, a division, a dissolution or an affiliation of the cooperative with a secondary or tertiary organization, must be taken by a qualified majority, generally two thirds. In a second GA, convened because the required quorum was not attained for the first meeting, these rules may be different (see above).

0.7.5.3 Board of Directors

Composition

As the executive organ of the cooperative, the board of directors must function according to precise legal rules.

Provisions relating to the board of directors		
	The law <i>must</i> contain rules on:	
Y	the minimum and maximum number of members to accommodate the specificity of each cooperative;	
Y	the eligibility criteria and a decision on whether or not all board members must be members of the cooperative. In cases where non member investors sit on the board of directors, one must ensure that they are not able to take decisions on their own nor constitute a blocking minority;	
Y	the incompatibilities, for example, between belonging to the supervisory committee and the board of directors of the current or financial year which is subject to control by the supervisory committee. Also, members of the same	

Provisions relating to the board of directors	
	family (to be defined) must not sit on the supervisory committee and the board of directors of the current or financial year which is subject to control by the supervisory committee.
Y	the duration of the mandate;
Y	the quorum and the mode of voting;
Y	the qualifications of the members of the board of directors.
	<i>These qualifications must be technical and personal. A professional manager may compensate a deficit in the first case but nothing will replace a lack of confidence of the members in their representatives.</i>

Powers of the board of directors	
	The list of powers of the board of directors covers, by default, all the matters which do not explicitly come under the authority of the general assembly. It includes the power to:
Y	represent the cooperative in all acts of civil life, to administer and manage the cooperative. <i>This power is limited by the legal capacity of the cooperative and the decisions taken by the G.A. Thus, the latter may for example fix a financial ceiling above which the board of directors cannot by itself commit the cooperative, or decide that certain decisions of the board of directors must be taken unanimously;</i>
Y	keep the registers of the cooperative and minutes of its own meetings;
Y	make certain that the accounts and the balance sheet are drawn up according to the rules in force, always keeping in mind the specific character of cooperatives;
Y	verify that the audit is made regularly and within the prescribed time limits before discussing the conclusions with the supervisory committee and the GA;

Powers of the board of directors	
Y	convene ordinary or extraordinary GAs and prepare the agenda according to the bye-laws;
Y	prepare the management report and the annual budget;
Y	admit, possibly provisionally, new members (see 3.7.3.3);
Y	co-opt in the case of a vacancy new members unless this power is explicitly given to the G.A.;
Y	facilitate the exercise of their rights by the members and make certain they perform their duties;
Y	facilitate the work of the auditors;
Y	nominate, if necessary, a manager or director, member or not of the cooperative and according to the same criteria as applied when electing board members, and ensure that he/she carries out the assigned duties correctly. In practice, this employee must assume the management functions which are not explicitly delegated to the board. He/she may employ and direct the necessary number of personnel;
Y	file an application for the opening of bankruptcy procedures;
Y	make certain that its functioning be transparent by adopting internal regulations, unless drawn up by the GA;
Y	assume the consequences of illegalities; and finally
Y	take on any other rights or obligations, assigned by the G.A. or contained in the bye-laws.

0.7.5.4 The supervisory committee

Composition

The supervisory committee carries out the control function in the interest of the members. Consequently, it is exclusively composed of members of the cooperative.

Provisions relating to the supervisory committee	
	Just as for the board of directors, the supervisory committee must be directed by a certain number of provisions, in particular on:
Y	the number of members;
Y	the eligibility criteria and the interdiction to sit on the supervisory committee at the same time as on the board of directors of the current or a financial year which may be subject to control by the supervisory committee. The presence of several members of a same family (to be defined) in one or several organs must be avoided;
Y	the duration of the mandate;
Y	the quorum and the mode of voting;
Y	the financial liability;
Y	the election of the members of the board of directors in cases where they are not elected by the GA or in the case of a vacancy if it is impossible for the GA to take a rapid decision, subject to confirmation by the latter.

Powers

- ☒ The supervisory committee’s principal task is to control the activities of the board of directors and those of any commission. In order to be able to carry out this task, it will have access to all information at any time. Since it is only answerable to the GA, it may only take orders from that organ. Should the board of directors fail to properly convene a GA, the supervisory committee will convene the GA.

0.7.6 Capital formation, accounts and distribution of surplus

0.7.6.1 Financial resources

Principle

The autonomy of cooperatives, guaranteed by law, will not become reality unless they have the necessary economic independence and, in particular, the financial independence.

Before resorting to external financing the consequences thereof must be sufficiently considered.

Internal financial resources:

┆ shares

Shares are nominative, indivisible, non-transferable (unless decided otherwise by the GA), not attachable and non-negotiable. They may be paid in money, kind, labour or services.

The amount of capital held by one member must be limited so that the principle of equality is not endangered. If, through the termination of a membership, this balance becomes disturbed, the cooperative must redistribute the shares.

The shares do not constitute a gainful investment. It is money which the members put at the disposal of their cooperative for the time of their membership in order for the cooperative to attain the jointly fixed objective.

┆ additional shares

- ☒ *It may be advantageous to encourage members to subscribe to additional shares. These may be conceived in such a way as to not entail an additional financial liability, to grant the right to fixed interest payments, to be reimbursable upon request, or to grant a right of participation in the reserves upon withdrawal from membership.*

┆ further means to ensure minimum internal financing:

The financial weakness of cooperatives, brought about mainly by the instability of the number of members and thus the amount of share capital, is also a result of the economic rationality of the average member. As a rule, the members have limited amounts of cash only, which they might not necessarily be inclined to invest in the cooperative. This behaviour is explained by the limited interest that they may expect from such an investment but also by the fact that additional shares do not increase their power in decision making.

To counterbalance, the legislator might fix a limit below which the share capital must not fall, even if this means that a withdrawing member is not immediately reimbursed his share, or that the remaining members are obliged to contribute to the recapitalization by making supplementary payments. Such a system of separating the amount of share capital from the number of members brings cooperatives close to the financial structure of capitalist enterprises.

A reserve fund must be compulsory. If indivisible, such a fund assures minimum stability and limits the risk of voluntary liquidation driven by speculation.

The legal reserve fund could be supplied by:

- X the transfer of a minimum percentage of the surplus gained through transactions with the members until the fund reaches at least an amount equivalent to the share capital;
- X the transfer of the total profit gained on transactions with non-member users.

This use of the positive results of the cooperative enterprise can be all the more interesting as the sums transferred to the reserve fund should not be taxed, as opposed to the share a member may get of the surplus even when transformed into a credit, a deposit or an additional funding by that member;

X the transfer of the results of activities not related to the objective of the cooperative such as, for example, the sale of fixed assets.

☒ Finally, the legislator should encourage the establishment of education, training or any other statutory reserve funds.

External financial resources

☒ External financing may be attracted by issuing transferable investment certificates for members and non-members granting a right to participate in the distribution of the surplus and in the distribution of the assets in case of dissolution without, however, granting any additional decision making power.

0.7.6.2 Surplus distribution at the end of the financial year

It is important to distinguish between profits and surplus.

! By definition, cooperatives ought to calculate the prices for transactions with their members near costs. In order to cover market related risks, a small profit margin must be included which will be returned to the members at the end of the financial year if the balance sheet shows a surplus. This redistribution, in the form of patronage bonuses, calculated as a prorata of the transactions with the cooperative, thus constitutes a deferred price reduction. Therefore, instead of speaking of profits in this connection one should speak of temporary surplus. Since there is no profit, there is no taxable profit either.

The surplus will be distributed in the following manner:

X transfer to the legal reserve fund;

X transfer to the statutory funds, if any;

X interest payments on the paid up shares and the investments, at a rate equivalent to that paid by the banks for certain kinds of deposits. Interest payments on investments may be staggered;

X patronage bonuses to the members as a prorata of their transactions with the cooperative;

X premium payments to employees.

It must be repeated: Any such payment to members is conditioned by members having fulfilled their obligations, especially having paid up their shares.

0.7.6.3 Distribution of capital

In the case of resignation or exclusion, the shares are reimbursed at their nominal value, in order to avoid membership motivated by speculation. Where the economic interests of the cooperative were seriously threatened by such (immediate) reimbursement, it may be withheld.

As a rule, the same type of reimbursement of shares applies in the case of dissolution or liquidation. The remaining (liquidated) assets are transferred to the cooperative movement, to a charity organization or, in the exceptional case where the legal reserve fund is divisible, they are distributed among the members according to the method used in distributing a surplus at the end of the financial year.

0.7.6.4 Transactions with non-member users

Depending on its objectives and its situation, each cooperative must decide whether it wants to offer its services to non-members as well.

In cases where membership is based on a pre-existing group, e.g. savings and credit cooperatives founded within an enterprise or a district, non-members of such groups might not be admitted.

If non-member business is admitted, it is important not to let it jeopardize the independence of the cooperative. The volume of transactions with non-members must consequently be limited so as not to restrain the freedom of its members. This might be done by fixing a percentage of the total turnover, above which no transactions may be made with non-members.

For the purpose of taxation, distribution of the surplus and supplying the legal reserve fund, bookkeeping must distinguish between the transactions made with members and those made with non-members.

0.7.7 Audit

The purpose of the audit is to check that everyone respects the rules of the game. It is a periodical control of whether the attribution of the status of legal person continues to be justified. It helps to monitor the interests of third parties, managers and members. As such, it is a general tool for any kind of enterprise.

- ! The specificity of cooperatives requires the auditor to make additional investigations to ensure that cooperatives comply with the task of promoting their members. The fact that the objective of cooperators differs from the purely financial interest of company stock holders must especially be taken into account by the auditors who have to be trained accordingly.

The audit of a cooperative can thus not be made only on the basis of accountancy documents. The auditors have to verify whether the overall objectives, which the cooperators set, were reached or at least furthered, and that the decisions of the management were taken in conformity thereto. Scrutiny of the minutes of the meetings of the board of directors might give useful information. The members must be consulted and their opinion used in drawing up the final report.

Periodical internal and external audits are indispensable procedures. The turnover, the kind of activities or other criteria may serve as a basis for defining their frequency.

The internal audit will be carried out by members. Their number, the duration of their mandate, the required qualifications, powers, duties and salary as well as their civil and penal responsibility must be determined by the general assembly. Internal auditors may not be or have been a member of a cooperative organ which is or may be subject to the auditors' control.

The external audit will be carried out by a union, a federation, or a confederation of cooperatives or by private auditors. Only as long as the cooperative movement is not yet able to provide this service, may a public authority audit cooperatives. In no case must an administrative unit in charge of the promotion or the registration of cooperatives audit cooperatives.

On the other hand, the conclusions drawn from the audit must be communicated to the competent authority. The auditor's report is to be submitted to the board of directors and the supervisory committee in order to be explained to the GA. The auditors must have the right to participate in this meeting and, should the board of directors not have convened the GA, or not have (sufficiently) explained the contents of the auditor's report, they may do so.

The establishment of an audit system, independent from the state and cooperatives, must be a priority task in reforming the cooperative system. An audit fund might be created to allow those cooperatives, which need auditing most, to be able to afford it.

0.7.8 Forms of dissolution

0.7.8.1 Dissolution without liquidation: Amalgamation, division and transformation

Principle

The autonomy of cooperatives permits them to dissolve without any restriction, provided the interests of third parties are preserved. Thus, creditors may object to the dissolution as long as they have not been satisfied.

The law must lay down the steps to be followed, from the majority required for such a decision to the modifications to be entered into the public register.

According to the freedom of association principle, members opposing the dissolution must have the right to resign.

Amalgamation

There are two types of amalgamation:

- X One cooperative is absorbed by another one, something which is at times psychologically difficult for the members of the absorbed cooperative.
- X A new cooperative is born by the merger of two or more cooperatives. In this case, new bye-laws will have to be adopted.

Often expectations as to the economic effects (rationalization of the management and administration, economies of scale, etc.) are not met because of identification problems related to the enlargement which in turn entails demobilization and difficulties in decision making etc.

Division

In the case of a division, members, assets and debts have to be split.

Transformation

- ☒ Only those cooperatives which have a divisible legal reserve fund may be transformed, within the limits of the provisions relating to the new organization. In the case where the legal reserve fund is indivisible, the members have the possibility of dissolving their cooperative and constituting a new organization.

0.7.8.2 Dissolution with liquidation

In the case of dissolution with liquidation, too, the decision may be taken by the cooperators independently. A quorum and a qualified majority is, however, required due to the extent of the decision. Several legislations require that at least two successive general assemblies be held and decide on the question.

The dissolution may also be pronounced by an authority, at its own initiative or upon request. Such a decision can in particular intervene when the GA has not pronounced its dissolution, although:

- ┆ the duration stipulated in the bye-laws has come to term;
- ┆ the objective of the cooperative has been attained or is impossible to attain;

- ┆ the conditions for registering the cooperative are no longer given, for example when the number of members remains below the required minimum during a specified period of time;
- ┆ the cooperative has repeatedly violated laws, regulations and/or its own bye-laws;
- ┆ the cooperative is bankrupt after having taken into consideration the possible obligation of the members to make supplementary payments.

If there is no legislation concerning bankruptcy or if it turns out to be insufficient, it will be necessary to include provisions in the cooperative law.

- ┆ the cooperative has not had any activity during a given period of time.

Other reasons, to be specified by law in order to avoid any arbitrary diversion.

The liquidation procedure, from its official beginning, the nomination of the liquidators, the establishment of the opening and closing balances, the transactions with the creditors, the distribution of assets etc. to the publication of the deletion from the register, must be regulated.

0.7.9 Simplified structures

- ☒ Even though the experiences of pre-cooperatives can be criticized, this does not mean that the provision of a less complex form of organization than cooperatives is not necessary. Among other forms, the French *groupement d'intérêt économique* (GIE),⁹ or the Cameroonian *common initiative groups*,¹⁰ might serve as models.

! Unlike with pre-cooperatives it is not a question of granting a temporary status to organizations which should eventually become cooperatives, but to recognize the diversity of needs and organizational capacities. The state might, in a simplified procedure, recognize such groups taking into account their reduced size, turnover, share capital, degree of inter-relatedness with third parties etc., which might require less strict rules on accountancy, audit and internal administration (number of organs, number of members of the organs, documents to be kept etc.).

0.7.10 Apex organizations, unions, federations and confederations of cooperatives

⁹ The French GIE date from 1967, see. the respective laws from 1984 and 1985.

¹⁰ See law number 92/006 of 14 August 1992 relating to cooperative societies and common initiative groups, and decree of application number 92/455/PM of 23 November 1992.

The freedom of association includes the right of cooperative organizations to form apex organizations, unions, federations or confederations. The state should refrain from any intervention except monitoring these organizations' compliance with their duty to represent their members.

The cooperative law must consequently define:

- ┆ the legal form of the different levels of this cooperative pyramid, specifying the activities which each level can exercise;
- ┆ the rights and obligations of the organizations of second and third degree in terms of:
 - X representation of their members at national, regional and international level;
 - X promotion, education and training;
 - X advice;
 - X financial and insurance services;
 - X economic services (marketing, supplies, exports, imports, etc.), at regional, national and international level;
 - X development of inter-cooperative relations;
 - X research and development;
 - X arbitration between the member organizations;
 - X control, audit, etc.;
 - X popularization of the cooperative law.

In order to establish a system of partnership between the state and cooperatives, in full respect of the freedom of association, the state should promote an independent and competent cooperative movement.

0.7.11 Dispute settlement

The question is whether disputes within the cooperative movement, i.e. between members, between members and their cooperative, between organs of a cooperative, between cooperatives, between cooperatives and their secondary or tertiary organization, must be subject to general or special arbitration before the parties may access a general or a special court of law.

Generally, arbitration is preferred to official procedures, for financial reasons, delays, and also because it allows for the consideration of local human and social issues. Especially because of the latter, the legislator should recognize such procedures and attempt to preserve traditional modes of mediation.

0.7.12 Miscellaneous, transitory and final provisions

0.7.12.1 Administrative decrees of application

- ☒ In countries where the law is traditionally accompanied by a decree, the statutory powers of the government must be limited to setting rules for the application of the law only.

0.7.12.2 Sanctions

The cooperative law must establish a list of acts liable to penal sanctions, indicating the articles of the penal code.

This should prevent cooperatives from taking on the role of judge, a duty which is not within their competence. Its own sanctions are those foreseen by the bye-laws and by individual contracts. The daily functioning of cooperatives is guaranteed by the possibility of dismissing the members of the board of directors and of the supervisory committee and applying sanctions to those who do not fulfil their obligations.

0.7.12.3 Repeals and transition

0.8. Legislative procedure

The participation of the main actors of the cooperative movement in the process of the elaboration of the law constitutes one of the most effective means of disseminating and applying the text. This kind of approach appears even more justified since the very idea of cooperation is based on participation.

However, it goes without saying that the legislative procedure established by the constitution must be respected, in order to ensure that the text fits into the legal system of the country and will be respected by everyone and not only by cooperators.

This participatory approach has been further developed and applied by the ILO in several countries.¹¹

0.9. Popularization of the cooperative law

- ! Knowing that in a good many countries, the official language and, *a fortiori*, the legal vocabulary are not mastered by the addressees of the law, who are often even illiterate, one understands that maximum attention must be focused on the popularization of the cooperative law. This massive task rests as much with the state as with the cooperative movement.

¹¹ See the *Recommandations générales relatives à la réforme des politiques et Législations coopératives* of the Panafrican Cooperative Conference in July 1996.

4. The international dimension of cooperative legislation

The reform of cooperative legislation has become a field of international cooperation. As a rule, the latter favours the transfer of western legal know-how which, on numerous occasions has been of little use outside its own cultural context.

It is somehow paradoxical that at the very moment when lawyers begin to take an active role in this process and when appeals for the respect of cultural diversity multiply, confusion between the concepts of law and *laws* culminates.

In order to better respond to the expectations of the countries carrying out cooperative reform programmes, it must be made clear that cooperatives may only prosper if their members are independent from social ties in their economic activities and if economic life in general is kept separate from other social activities.

If one considers the structure of states, one observes a uniform model. Legislators tend to recognize only organizations which function along the same principles as the state and, hence, they favour cooperative organizations. If, on the contrary, society at large is to be able to organize according to diverse rules, one has to establish to what extent the universally recognized cooperative principles can be applied to other organizational forms.

It is important to distinguish between *cooperatives* as voluntary associations of persons and *communities*. Societies, where the community is considered as an indivisible entity, find it difficult to integrate the concept of legal entity which allows for abstract bodies to exist independently of its members. Thus it is, for example, difficult to understand that the financial liability of cooperators may be limited.

The confusion of the concepts of association and community is nurtured by a tendency to perceive cooperatives as a prolongation of traditional ways of mutual aid. The idea of associations based on membership of physical persons nevertheless gains ground, not in the least through international cooperation.

In a context marked by the formal adoption of a cooperative law and the persistence of this confusion, it often happens that the real life of cooperatives is largely inspired by community-type mechanisms. In many a case, this mixture ends up being harmful to both institutions. In an attempt to reject transplants which are too western, some do reject the introduction of cooperatives as well.

However, in today's world, cultures meet and mix. Although they are culture-specific, cooperatives have their place everywhere. Discouraging the transfer of ready-made model laws does not imply the rejection of other experiences under the pretext that they come from elsewhere. The solution lies in the search for alternatives characterized by compromise, innovation and especially by the articulation of different modes of organization.

The problem is not letting oneself be inspired by western cooperative law but rather neglecting the necessity to adapt it properly. The fact that we are still lacking mechanisms which could reduce the tension between the cooperative mode of organization and the community way of life, is an example of this neglect.

! There are numerous obstacles on the way which could lead to the adoption of cooperative legislations which are better adapted to their cultural context. In order to surmount these one must start to

- ┆ recognize each country as the agent of its own development and cease to consider it as an object of development;
- ┆ universalize the process of public international law making;
- ┆ formulate and apply a theory of the Right to Development;
- ┆ redefine the role of lawyers in development cooperation by rejecting the wide-spread conception according to which law is a technique without technology;
- ┆ reject the idea of western law being universal;
- ┆ redefine the concept of economic efficiency, of which the classical definition, based on a material evaluation, is not universal;
- ┆ cease to consider cooperative law as a means of development aid;
- ┆ search for ways of resolving the conflict between different legal systems within the same state;
- ┆ reject the idea of the primacy of a supposedly unifying written law;
- ┆ entrust local administration with the application of the cooperative law, even if it is a so-called *Atraditional@* administration;
- ┆ favour existing traditional conciliation procedures knowing that they might prove to be more efficient than the law in solving cooperative disputes.

This search for cooperative legislation which better reflects the cultural particularities of a given country, is a challenge that the international community must accept. It is a delicate task because it could be conceived as going against the present globalization of economies, and it could bear the risk of disintegrating the cooperative movements by giving away too much of their common features.

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