



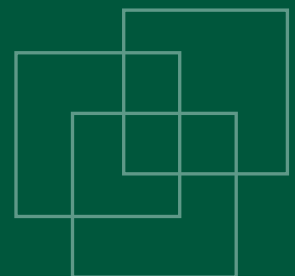
International
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Guidelines for Cooperative Legislation

third revised edition

by Hagen Henry



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by
Hagen Henry

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Foreword

The International Labour Organization (ILO) promotes the cooperative business model to create and maintain sustainable enterprises. It recognizes that cooperatives not only create and maintain employment and thus provide income, but also pave the way for broader social and economic advancement. The ILO also acknowledges that cooperatives serve their members and as such balance the need for profitability with the needs of their members who own and control their enterprises; they are different from stock companies and thus require laws that recognize their specificities.

The Office of the ILO and its Cooperative Branch provide guidance and advice on the creation of enabling environments for cooperative development at national, regional and international levels. It has produced two previous editions of the *Guidelines for Cooperative Legislation* that have assisted policy and lawmakers as well as other stakeholders update existing and draft new cooperative legislation.

This new third edition has been produced to incorporate new developments that impact how cooperative law is being developed. These new developments are multiple and include a general trend in the harmonization of law, the emergence of international regulations which directly impact enterprises, new regional cooperative legislation and regional framework laws as well as innovation in the cooperative form of enterprise itself. Since the last edition, there has also been a renewed interest in the cooperative form of enterprise. Their documented resilience to crisis and thus sustainability, and their particularity of being principles-based enterprises that are member-controlled and led are increasingly drawing the attention of governments, policy makers and citizens around the world.

The declaration by the United Nations of 2012 as the International Year of Cooperatives, under the theme, “Cooperative enterprises build a better world”, is one manifestation of the interest in cooperatives. The ILO joins in the observance of the Year with the publication of this third edition of the *Guidelines for Cooperative Legislation*. It contributes specifically to one of the principle aims of the Year which is to “encourage governments and regulatory bodies to establish policies, laws and regulations conducive to cooperative formation and growth”. In line with the spirit of the Year, the *Guidelines* have been developed with universality in mind to the same extent as that of the Promotion of Cooperatives Recommendation, 2002 (ILO R. 193) which also applies to all countries and all sectors and which suggests in its Paragraph 18. (d) that “International cooperation

should be facilitated through: [...] developing, where it is warranted and possible, and in consultation with cooperatives, employers' and workers' organizations concerned, common regional and international guidelines and legislation to support cooperatives”.

Finally, these *Guidelines for Cooperative Legislation* have been produced with a number of readers in mind: lawmakers, cooperative representatives, and other cooperative stakeholders including workers' and employers' organizations, researchers, and students among others. They address the following questions: Why cooperatives? What are cooperatives? Why legislate on cooperatives? What kind of cooperative law? How to legislate?



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Acknowledgment

I wish to thank all those with whom I had the privilege to work on matters of cooperative law over many years. They all helped to improve this text. I shall not repeat the names I mentioned in the previous editions of these Guidelines. At the risk of forgetting many, for which I apologize, let me add here (in alphabetical order): Dr Paul Armbruster, Prof Dr Johnston Birchall, Mr Thomas Carter, Ms Maria Elena Chavez Hertig, Prof Dr Dante Cracogna, Prof Dr Emanuele Cusa, Ms Christine Dötzer, Mr Mathieu De Poorter, Dr Clemencia Dupont Cruz, Dr François Espagne, Prof Dr Isabel Gemma Fajardo García, Prof Dr Antonio Fici, Ms Katharina Göbel, Prof Dr Nicole Göler von Ravensburg, Mr Mehmet Vehbi Günan, Ms Erika Gutierrez, Mr Bernd Harms, Mr Jan Harms, Prof Dr David Hiez, Mr Jan-Eirik Imbsen, Mr Andreas Kappes, Mr Idrissa Kéré, Mr Ada Suleyman Kibora, Mr Kari Lehto, Mr Iain Macdonald, Dr Manuel Mariño, Mr Sam Mshiu, Mr Ricardo Perez Luyo, Dr Enzo Pezzini, Mr Chea Saintdonat, Ms Constanze Schimmel, Mr Pablo Segrera, Mr Jürgen Schwettmann, Mr Guy Tchami, Mr Jan Theron, Ms Ursula Titus, Dr Gabriele Ullrich, Mr Igor Vocatch-Boldyrev, Ms Carlien van Empel, Mr Philippe Vanhuynegem, Prof Dr Govinraj Veerakumaran, Mr Raimo Vuori, Prof Dr Michèle Zirari-Devif. I wish to also thank Ms Joan Macdonald for editing these *Guidelines*.

The ILO has again supported me financially. I am grateful for that.

I remain entirely responsible for the contents of this third edition of the *Guidelines for Cooperative Legislation*.

Kauniainen, Finland, March 2012
Hagen Henry

Introduction

Motto

Cooperative enterprises build a better world, but cooperatives cannot - and must not - save the world.

The motto is used to set the spirit of this third edition of the *Guidelines for Cooperative Legislation (Guidelines)*. Cooperatives are a special type of private enterprise and neither they, nor cooperatives in the wider acceptance of the word, are a panacea for all the evils of this world. This spirit is by no means entirely new, but it is now universal.

The first part of the motto is the slogan of the United Nations (UN) International Year of Cooperatives 2012 (IYC).¹ The inclusion of the word “enterprise” in the slogan was decided in recognition of the dual character of cooperatives. They are associations of persons who pursue their objectives through their own enterprise. This definition is laid down in or is, respectively, recognized by the main international instruments concerning cooperatives, namely the 1995 International Cooperative Alliance (ICA) Statement on the Cooperative Identity (ICA Statement)², the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives (UN Guidelines)³ and the International Labour Organization (ILO) Promotion of Cooperatives Recommendation, 2002 (ILO R. 193)⁴.

The UN Resolution declaring the IYC refers to these texts. It signals that the member States of the United Nations agree with some one billion members of cooperatives of all sizes, types and in all sectors of the economy in almost all countries on the importance of cooperative enterprises for economic and social development. This constitutes a breakthrough.⁵ For decades, many national governments, regional and international, governmental and non-governmental organizations were reluctant to recognize cooperatives as a viable business model,

¹ United Nations. General Assembly Resolution A/RES/64/136, 2009.

² See Annex 1.

³ UN document A/RES/54/123 and A/RES/56/114 (A/56/73-E/2001/68; Res/56). See Annex 2.

⁴ ILO Recommendation 193 concerning the promotion of cooperatives. See Annex 3.

⁵ Prior to that the World Bank (see its 2008 World Development Report) and the IMF (see Fonteyne, Wim, Cooperative Banks in Europe – Policy Issues, IMF Working Paper WP/07/159; Hesse, Heiko and Martin Cihak, Cooperative Banks and Financial Stability, IMF Working Paper WP/07/2) had started re-considering the advantages of cooperatives as compared to other types of business organizations. See also UNDP, “Creating values for all: Strategies for doing business with the poor”, 2008.

worthy of being promoted on an equal footing with what continues to be portrayed as the most efficient type of enterprise, namely stock companies.⁶ Indeed, the relative stability of cooperatives during the current so-called crisis has prompted publications demonstrating that cooperative enterprises are not less efficient enterprises and that the notion of efficiency needs rethinking. And no doubt, cooperatives will also be a suitable form of performing in a changed business world in the future.

The second part of the motto is an answer to the front-page title of a magazine published some years ago which asked “Can co-ops save the world?”⁷ Cooperatives are one of many enterprise types. Their comparative competitive advantages are, as are those of any enterprise type, relative to the objectives pursued through the enterprise by those who control it. These objectives are diverse. Therefore the world of enterprise types should be diverse as well. This diversity is a prerequisite for sound economic and social development. Besides, diversity is a prerequisite for the development of enterprises, including cooperatives.⁸ In fact it is a condition of sustainability, the now universally accepted development paradigm.

Besides portraying cooperatives, controlled by their members, as a means to achieve goals which stock companies do not find profitable and which governments are no longer able or willing to achieve (commonly summarized as “cooperatives are children of necessity”), the international texts concerning cooperatives already listed above also reflect another equally important shift in how cooperatives are perceived: more and more, cooperatives are seen as a choice made by (potential) members seeking a specific and distinctive type of enterprise; hence they are also “children of preference”. This choice needs equally attending to by policy and lawmakers. The argument does not overlook the fact that often the formation of cooperatives remains the only “choice” that disadvantaged people have. This shift has also helped to make cooperative policies less ideological.

The three main instruments concerning cooperatives listed above reaffirm the importance of law⁹ as a necessary, albeit not a sufficient, means for the

⁶ The notion of “stock company” varies from jurisdiction to jurisdiction. For the purpose of these Guidelines, the word is used to signify a capital based company the equity of which is divided into shares (stocks) and where the rights of stockholders are defined in relation to the number of shares they hold.

⁷ Developments: The international development magazine. Special edition. 2000.

⁸ See for example ILO R. 193, Paragraph 6 *et passim*.

⁹ I use the words “law” and “legislation” in an interchangeable manner unless the difference counts. The two main reasons for this are that these words mean different things in different countries and that I understand the process of lawmaking (legislation) as an integral part of law. See definition in Box 2.

development of cooperatives. This third edition of the *Guidelines* centres on ILO R. 193 as this ILO standard forms the nucleus of the public international cooperative law. As will be demonstrated below,¹⁰ the adoption of the two other instruments is an argument to support this view.

The adoption of ILO R. 193 is part of a long history of ILO engagement in cooperative legislation. A short recall of this history may help understand the rationale of the *Guidelines*.¹¹

Almost from the start of its operations in 1920, the International Labour Office (Office) has assisted member States of the ILO to improve their cooperative law. At the beginning the Office mainly gathered information on the various cooperative laws and it functioned as a clearing entity. The first technical cooperation mission to focus on cooperative law took place in 1950 to Turkey. Between 1952 and 1968¹² the Office carried out some 200 missions to 65 countries through a large technical cooperation programme of the United Nations Development Programme (UNDP).¹³ During that time, approximately 100 experts advised countries of the South. Often, this advice included that on cooperative law.¹⁴

The adoption in 1966 of the ILO Recommendation No.127 concerning the role of cooperatives in the economic and social development of developing countries (ILO R. 127) with a whole chapter (Chapter III) on cooperative law further justified respective technical assistance, though limited to the “developing countries” member States of the ILO.

As of 1993 the Office has systematized its assistance related to cooperative law-making. Under the ILO-DANIDA (Danish International Development Agency) programme on cooperative development in rural areas the Office initiated that year a specific activity, called COOPREFORM (Structural Reforms Through Better Cooperative Development Policies and Laws). The activity supported ILO “developing country” member States in revising their cooperative policies and legislation. As part of that activity, the ILO commissioned in 1996 a working paper on cooperative legislation from the present writer. It was entitled *Framework for Cooperative Legislation*. Originally in French, this working paper gradually

¹⁰ Part 2, Section 4.1.3.1 The legal value of ILO R. 193.

¹¹ For more details on this history, see Henry, *The Contribution of the International Labour Organization to the Formation of the Public International Cooperative Law*. (In print).

¹² See ILO International Labour Review 6/1973, pp.539 ff.

¹³ UN Expanded Programme of Technical Assistance (EPTA; UNDP TA 164-4-d-3-1-1).

¹⁴ For cooperative law related activities of the ILO in the past see International Labour Review 5/1925; 10/1948; 1959; 2/1965; 6/1969; 6/1973; 1992. Cooperative Information 2/1970; 4/1970; 3/1971; 3/1972. Orizet, pp.42, 45. ILO “Dix ans d’Organisation internationale du Travail”, Chapter III, p.294 and the ILC Report VIII (1) 1965, Introduction, p. 3.

became available also in Arabic, Chinese, English, Portuguese, Russian, Spanish and Turkish. Following the proposal by the ICA, and in particular the European Legislative Expert Group of ICA, the Committee for the Promotion and Advancement of Cooperatives (COPAC)¹⁵ then sought the agreement of the ILO to have this working paper revised. In preparation for its 2001 General Assembly the ICA published the revised version as *Guidelines for Cooperative Legislation*.¹⁶ The ICA General Assembly 2001 endorsed those guidelines.¹⁷

Thus the original working paper ceased to be discussed only in or by the countries of the South. This was a decisive step towards overcoming a rather unfortunate divide. The cooperative movement is as one. The cooperative principles are as one.¹⁸ So, basic cooperative legal matters should also be as one. The adoption of the ILO R. 193 by the International Labour Conference (ILC) in 2002 proved this step right. Indeed, the ILC emphasized this unity by making ILO R. 193 universally applicable.

In the light of the newly adopted UN Guidelines, ILO R. 193, as well as the revision of a great number of cooperative laws, the *Guidelines for Cooperative Legislation* were revised and published as a second edition by the ILO in 2005.¹⁹

Since then, a number of political effects and those of globalization have led to a crossroads in cooperative legislation. The decision on which direction to take - further adaptation to perceived pressures by the financial market, return to the cooperative principles or new paths - has to be made in a moment of intellectual crisis as far as economics are concerned. In a reciprocal process, cooperative legislation has contributed to the occurrence of this crisis.

The economic, social and political circumstances any law must reflect if it is to be effective needed analyzing against this background. The result of this analysis prompted the revision of the second edition of the *Guidelines* and it justifies the publication of this third edition.

This third edition is also a response to the expressed needs of those using previous editions; in particular those who engage in cooperative lawmaking and who also need to be able to make their case in the political debate. The format of this third

¹⁵ At that time the International Federation of Agricultural Producers (IFAP) was also a member of COPAC.

¹⁶ Henry, *Guidelines for Cooperative Legislation* (2001).

¹⁷ ICA. *Review of International Co-operation*, 95, 1/2002, pp.42 ff. (45).

¹⁸ Unless indicated otherwise, the term “cooperative principle/s” refers to the principles as enshrined in the ICA Statement and as integrated into ILO R. 193.

¹⁹ Henry, *Guidelines for Cooperative Legislation* (2005). Second edition of the French version in 2007, see Henry, *Guide de législation coopérative*.

edition of the *Guidelines* thus departs somewhat from that of the previous editions.

As with the previous editions, these *Guidelines* are not a recipe to follow. Whilst taking a clear position on the matters to be regulated in a cooperative law, they also mention other options and their consequences. They leave space for country specifics and for the particularities of national or regional legal systems. They make no suggestions as to the number of general or specific cooperative laws a country should have, the form of the law or the arrangement of its sections, chapters and/or articles.²⁰ Beginning with the elaboration of the *Framework for cooperative legislation*, the ILO rejected the idea of presenting a model law. Model laws are often simply transferred or copied without the legislator adapting their underlying legal concepts to the particularities of its jurisdiction. Such copies rarely become effective law.²¹ These *Guidelines*, on the other hand, are meant to do no more than incite the legislator to construct itself a cooperative law, based on internationally accepted standards.

These *Guidelines* centre on ILO R. 193. This is a tribute to public international law. As said, it will be argued that ILO R. 193 constitutes the nucleus of this international law. The inherent harmonization is both a consequence of and a prerequisite for the trend of further regional and international economic integration and it is an unavoidable consequence of globalization. If cooperatives are to remain competitive, the question is not whether cooperative legislation should follow/support this trend, but how peculiarities can be safeguarded within this trend. The art of the legislator consists in refraining from simply transposing this international law and translating it instead to its jurisdiction.

Furthermore, only guidelines for universal use might carry the necessary weight to contribute to counterbalancing the “uniformization” and “companization” of all forms of business organizations. The advantages of cooperatives as compared with other types of enterprises need strengthening through a common global effort which for stock companies has already been undertaken. The debate on cooperatives is shifting. At the national and international levels it used to centre on the difference between the various types of cooperatives. At the global level

²⁰ The variety of solutions – no cooperative law at all, inclusion of the subject matter in general commercial or civil codes, other laws, for example laws on associations, special cooperative law, etc. – is of no importance for the objective pursued by these Guidelines. For this variety of solutions, see Montolio, *Legislación cooperativa en América Latina*.

²¹ This argument is an unduly sweeping argument. Other actors, like the World Council of Credit Unions (WOCCU), successfully pursue another policy. In the case of WOCCU this might be due to a high degree of similarity of savings and credit cooperatives around the world. See Part 2, Section 4.1.2.2 WOCCU model cooperative law. The position taken here must not be understood as a value judgment.

it now centres more on the distinction of cooperatives (of whatever type) from other enterprise types. ILO R. 193, especially its Paragraph 7 (2), must be read in this context as well. The transnational character of ILO standards has been exemplary for the emergence of a global law by subject matter.

Previous editions of the widely circulated *Guidelines* were used as background material for cooperative policy and legislation consultancies in a large number of countries²² as well as for training events especially at the International Training Centre (ITC) of the ILO in Turin. Feedback has been taken into account in this updated edition.

Legal terminology varies from country to country, even within the English-speaking world. Often I sought guidance from the glossary of cooperative terms listed in the bibliography.²³ But I cannot undo the fact that I was socialized in German legal thinking. I wish to express my excuses to those who live under other conceptions and invite them to continue discussing the contents of these *Guidelines* in order to make them more universal, for the sake of adequate cooperative law.

An additional difficulty in writing these *Guidelines* has been that the readership is not easily definable. I hope that the *Guidelines* meet the interest of all those who need to know about cooperative law: lawmakers, cooperators, students, researchers and others.

The *Guidelines* are divided into four distinct parts:

Part 1 addresses the rationale for cooperative law. It provides a review of issues that will help lawmakers and other cooperative stakeholders explain and defend the need for cooperative law and why specific areas in cooperative law are important. This section is a new feature of the guidelines and responds to the expressed needs of previous users for more discussion on the basis of why the law should be reviewed.

²² Africa (OHADA), Bangladesh, Bhutan, Plurinational State of Bolivia, Bulgaria, Burkina Faso, Cambodia, Chad, China, CIS countries, Columbia, Croatia, Cuba, Egypt, Estonia, a number of EU Member States and EES countries, Guinea (Conakry), India (Andra Pradesh), Japan, Jordan, Kenya, Kyrgyzstan, Laos, Latin America (Ley marco para las cooperativas de América Latina), The Former Yugoslav Republic of Macedonia, Madagascar, Malawi, Mali, Mexico, Mongolia, Morocco, Mozambique, Niger, Norway, Occupied Palestinian Territory, Paraguay, Peru, Poland, Romania, Ruanda, Russian Federation, Serbia, South Africa, Southern Sudan, Tajikistan, Trinidad and Tobago, Turkey, Uganda, Vanuatu, Vietnam, Federal Republic of Yugoslavia, Zambia, Zanzibar.

²³ Münkner, Hans-H., Vernaz, Catherine. 2005. Annotiertes Genossenschaftsglossar.

Part 2 provides specific information on cooperative legislation. It includes an introduction to basic principles of cooperative law, reviews the current state of cooperative legislation at the global and regional levels, and addresses cooperative law within the context of the social economy.

Part 3 provides an ABC of a cooperative law describing the specific elements that should be considered in any cooperative legislation.

Part 4 explains cooperative lawmaking.

Although reading the *Guidelines* in their entirety will be helpful to all stakeholders, these *Guidelines* have been prepared in the knowledge that different readers will be seeking advice and guidance on different issues. Each part can be used independently of the others. The substantial amount of footnotes throughout the text is provided to support the arguments and to suggest further reading. The text may however be read without having regard to them.

Annexes 1 – 3 reproduce texts to which the *Guidelines* frequently refer.

Part 1: Why cooperatives? The rationale for cooperative law

“L’institution économique qui a le plus d’avenir dans le monde contemporain est la société coopérative. [...] les institutions croissent pour traduire la pensée économique en action.” (William Barnes²⁴).

1. GENERAL

Cooperative legislation tends to do away with cooperatives as institutions in the legal sense. For some, cooperatives are a transitional type of enterprise. Their question is, “So what, if cooperatives disappear as a legal form of enterprise?”

As said, cooperative legislation stands at a crossroads. After having given an overview of the tendency in cooperative legislation, these *Guidelines* attempt to answer the question of where to go in cooperative legislation. Much depends on whether cooperatives will remain a viable enterprise alternative and whether the political arguments in favour of the maintenance of this alternative are stronger than those against it. Considerations concerning globalization seek to explore the viability of cooperatives in the future; considerations concerning sustainable development seek to find policy arguments in favour of the maintenance of cooperatives as a specific enterprise type.

2. THE EVOLUTION OF COOPERATIVE LAW: FROM THE DISTINCTION OF ENTERPRISE TYPES TO THEIR ISOMORPHIZATION²⁵

The evolution of cooperative legislation can be divided into two, partly overlapping, phases - one from the mid-19th century to the present day, the other one starting in the 1970s. The first is marked by distinguishing cooperatives from stock companies, the second one by approximating them with stock companies.

²⁴ Barnes, p.569.

²⁵ The description and interpretation of this evolution over the past one and a half centuries is summary in nature and it generalizes at times to a degree which voids it of any meaningful content. The importance of national, regional, cultural and other differences is not underestimated.

The first cooperative laws were passed in the second half of the 19th century in the then industrializing countries.²⁶ They came in reaction to the perceived inadequacy of stock company law for the regulation of cooperatives and therefore distinguished cooperatives from stock companies.²⁷ In these countries, modern cooperatives had emerged prior to this legislation. In other countries, especially in the former colonies, things happened in the reverse order and roughly half a century later. Still other countries saw the emergence of cooperatives and their regulation happen concomitantly, mainly through immigrants from Europe or through eclectic borrowing.²⁸

The common finality of cooperative laws was to allow disadvantaged strata of society to access a legal form through which they could address their economic and social problems. The variety of histories added a number of particularities: organizational laws transcribing a sociological reality in the case of the then newly industrializing countries; organizational laws with a strong promotional component to create, where necessary, the sociological and socio-psychological facts necessary for the development of cooperatives in the case of the former colonies²⁹ and a mix of the two in the third category. After having shared the development in the industrializing European countries in a first phase, the countries which introduced a planned economy system from the beginning of the 1920s designated cooperatives as actors which were to execute state plans concerning economic and social development.

Roughly at the beginning of the 1970s a trend to “stock companize”³⁰ cooperatives through policies and legislation sets in.³¹ It overlaps the developments outlined

²⁶ For recent overviews of cooperative legislation, see Montolio, *Legislación cooperativa en América Latina*; Münkner, Hans-H., “Worldwide regulation of cooperative societies: an overview”, Contribution to the Conference on “Promoting the Understanding of Cooperatives for a Better World”, organized 15-16 March 2012 in Venice by Euricse, the European Research Institute on Cooperative and Social Enterprises. For recent accounts of how the cooperative idea travelled the world over, see Bialosgorski Neto, Sigismundo, “The History of the Rochdalian Cooperatives in Latin America” and Rhodes, Rita, “British Empire – the First Global Cooperative Development Agency”. Contributions to the 2011 Global ICA Research Conference on “New Opportunities for Cooperatives” 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings.

²⁷ See Egger. Legislators could draw during that time on rather sophisticated literature expounding this distinction.

²⁸ Examples of the latter are China and Japan.

²⁹ See especially the so-called British Indian Pattern of cooperation to which researchers devoted a seminar in 2004. The contributions to this seminar are published under the title, “100 Years Cooperative Credit Societies Act, India 1904”. See also Theron.

³⁰ By “stock companization” I understand those processes in legislation through which the features of cooperatives are being approximated with the features of stock companies. The term “stock company” is used as a generic term designating those enterprise types which centre on invested capital. The term “investment” is used as implying the legally supported expectation of the investor to receive the highest possible financial return on the investment.

³¹ The first amendments in this sense can be dated back to the 1973 cooperative law reform in Germany.

above. On the eve of the adoption of ILO R. 193 cooperative laws had again been under reform for a number of years. The reasons for the reforms differed according to the division of the world as it was perceived at the time, i.e. industrialized countries, countries in transition and developing countries. This situation is well captured in the preparatory report of the International Labour Office to the International Labour Conference, which was later to adopt ILO R. 193 in 2002 (see Box 1).

**Box 1: ILO. International Labour Conference, 89th session 2001,
Report V (1) (*emphasis by author*)**

“[...] Cooperatives in all industrialized countries are struggling to be economically successful in a highly competitive environment while remaining close to their members. This is why contemporary cooperative legislation in these countries is getting closer to general company law, so that cooperatives operate on an equal footing with other types of private enterprises. Recent cooperative legislation in industrialized countries [...] seeks to find a compromise between management for service and management for profit.

[...] When the centrally planned economies [...] began their transition to a market economy, their governments faced the immense challenge of elaborating a totally new legal, administrative and institutional framework for all aspects of life, including co-operative organization and management. [...] Contemporary cooperative legislation [...] generally recognizes the universal principles of cooperation and provides for a large degree of cooperative autonomy. However, these laws are not always fully adapted to local conditions and the local legal system, since they had to be formulated under great time pressure and (very often) under the strong influence of Western European law. [...]

[...] The majority of the developing countries in Africa, Asia and Latin America have been confronted since the mid-1980s with the effects of economic liberalization, globalization and structural adjustment, [...] especially in those countries where cooperatives were considered part of the government structure or an arm of the ruling party. As a result, the cooperative legislation of many developing countries has been subject to profound reform. [...] All cooperative laws adopted in the developing world since 1990 have reduced state influence over, and state sponsoring of, cooperatives, increased cooperative autonomy and self-reliance, and cut any links that might have existed between cooperatives and political organizations.”

Not least as a result of the adoption of ILO R. 193, the trend in cooperative legislation has become somewhat contradictory - on the one hand a growing respect for public international cooperative law with its obligation to maintain cooperatives as distinct legal entities; on the other hand continued companization.

As a result of attempts to create equal conditions for all enterprise types, the companization trend is marked³² by efforts to approximate cooperative law³² with the law applicable to stock companies through multifaceted processes which reinforce each other. These processes consist mainly in:

³² For the notion of law, see Box 2.

- i. unifying special laws applying to different types of cooperatives at national levels³³
- ii. unifying and harmonizing cooperative laws across national borders³⁴ and
- iii. aligning cooperative law with stock company law, especially as far as the highly intertwined matters of capital structure, management and control mechanisms are concerned.³⁵

Obviously, the parameters of these approximation processes differ. They nevertheless form one unit in the sense that the alignment takes place within, or through, each of them and is the more effective the more it concerns already harmonized or unified law.

³³ For example in France. See Münkner, *Wege zu einer Vereinfachung des französischen Genossenschaftsrechts*.

³⁴ See Box 3.

³⁵ Cooperative laws in Europe and the EU Regulation allow/require enterprises to (Articles in brackets refer to the EU Regulation):

- issue shares that are attractive to investors. See especially the following legislations: Sweden (1987) allows for debenture contributions from non-members which must not, however, exceed the amount of the ordinary share capital and not have voting rights attached to them. Finland (1990, 2002). France (1992): through bylaws non-member investments and revaluation of shares through incorporation of reserves. Italy (1992): financial backer members may have up to 33% of the total voting rights and 49% of the seats on the board of directors. Germany (1994)
- issue freely transferable (at times even at the stock exchange) cooperative investment certificates. See del Burgo, p.71
- have unlimited business with non-members (Article 1, 4.)
- hire professional, non-member managers and increase their power and autonomy vis-à-vis the board and the general assembly
- grant members limited plural voting rights (up to five votes) (Article 59, 2.), not based on capital contributions. See Chuliá, p.40
- arrange for delegate meetings, at times even with a free mandate for the delegates (Article 63)
- have non-member employees on the supervisory board, like for example in Germany under certain circumstances
- have minimum share capital (Article 3, 2.)
- merge with and acquire other enterprises
- grant (non-user) investor members, and even non-member investors, similar rights to members (Consideratum 9; Articles 14, 1.; 39, 3.; 42, 2.; 59, 3.). See Chuliá, p.38; del Burgo, pp.68 ff., 79 ff.
- distribute their reserve fund upon liquidation or conversion into a stock company (Article 75). As to the latter, see del Burgo, pp.87 ff.
- distribute their surplus according to the amount of capital invested by the members
- transform into stock companies, see especially the legislation in Estonia, Finland, Germany, Latvia, Lithuania, Sweden.

The EU Regulation allows for/requires, in addition:

- different categories of members with different rights and obligations (Articles 4, 1.; 5, 4.)
- capitalization of the reserves and attribution of the new shares to the members in proportion to their share in the previous capital (Article 4, 8.) and the
- issuing of securities (other than shares) or debentures for members or non-members, without voting rights, however (Article 64, 1.)
- Münkner (*Structural Changes in Cooperative Movements...*) described/foresaw this evolution as early as 1993.

Box 2: Cooperative Law

By “cooperative law” I understand all those legal rules - laws, administrative acts, court decisions, jurisprudence, cooperative bylaws/statutes or any other source of law - which regulate the structure and/or the operations of cooperatives as enterprises in the economic sense and as institutions in the legal sense.

This definition of cooperative law thus reflects a wide notion, one which comprises not only the cooperative law proper (law on cooperatives), but also all other legal rules which shape this institution and regulate its operations. The following areas, which are most likely to have this quality in any legal system, need mentioning: labour law, competition law, taxation, (international) accounting/prudential standards, book-keeping rules, audit and bankruptcy rules. This systemic view is also reflected in Chapter III of ILO R. 127. It is to be complemented by considering implementation rules and praxes, for example prudential mechanisms, audit, and registration procedures and mechanisms. It also includes jurisdiction as well as lawmaking procedures and mechanisms and legal policy.

The alignment of cooperative law with stock company law goes beyond introducing features of stock companies into cooperative laws proper. It can also be read from the at times indiscriminate application of other rules to cooperatives which were designed for stock companies and which contribute to shaping cooperatives as institutions and/or to defining their operations. In the sense of the wide notion of law underlying these *Guidelines* we need generally to look at labour, tax and competition law,³⁶ (international) accounting/prudential standards, bookkeeping rules,³⁷ and audit and bankruptcy rules.

Furthermore, one needs to consider the general quest for “flexible” law. Following this quest, lawmakers include ever fewer mandatory rules (*ius cogens*) into the cooperative law. Not least under the pressure of the financial market,³⁸ cooperators might take advantage of the reduced outreach of the legally binding and make

³⁶ Undifferentiated application of labour law to the work relationship between member employees and any type of cooperative. Inadequate taxation of cooperatives and their members, not differentiating between surplus and profit. Inadequate application of competition law to the relationship between cooperatives and their members.

³⁷ Especially those elaborated by the International Accounting Standards Board (IASB), the Financial Accounting Standards Board (FASB) and the Basel Committee on Banking Supervision: application of stock company specific accounting standards and book-keeping rules to cooperatives by inadequately qualifying cooperative member shares; by applying stock company merger rules to cooperatives, not considering the fact that member shares cannot be detached from membership; by applying the requirements of the so-called Basel II and III to cooperatives. See Cracogna, *Conclusiones sobre Normas Internacionales de Contabilidad*; Glanz et al.; Luttermann, *Rechnungslegung ist ein Rechtsakt, kein Marketing*. See also Groeneveld, Hans, “The Value of European Cooperative Banks for the Future Financial System” and Ory, Jean Noël, Andrée de Serres and Mireille Jaeger, “Have Cooperative Banks Lost their Soul?” Contributions to the 2011 Global ICA Research Conference on “New Opportunities for Cooperatives” 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings.

³⁸ See for example, Bauchmüller; Kohler: “Doch der globale Finanzmarkt kennt kein Erbarmen mit jenen, die anderen als seinen Regeln folgen wollen”.

Box 3: Unified / harmonized cooperative law

A number of regional organizations have passed uniform laws; others have elaborated model cooperative laws or at least guidelines in view of harmonization. See for example the 2008 Ley marco para las cooperativas de América Latina; the 1997 CIS "Model Law on Cooperatives and their Associations and Unions"; the West African Economic and Monetary Union (UEMOA) uniform law on savings and credit cooperatives; the 2010 Uniform cooperative act of the "Organisation pour l'harmonisation en Afrique du droit des affaires" (OHADA); the 1997 "Referential Cooperative Act" of India, revised in 2010; the CARICOM credit union legislation; the 2003 EU Council Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE); the Estatuto de las Cooperativas of the Mercosur States (Mercosur/PM/SO/ANT.NORMA 01/2009). Strictly speaking, the latter two do not belong to this category as they create a new type of cooperative without replacing the national laws. However, it may be argued, at least in the EU case, that it has a harmonizing effect on the national cooperative laws.

bylaws/statutes which give way to companizing their cooperative. In general, this phenomenon has led to a further complication of the legislation. There seem to be two, somewhat contradictory, correlations in the evolution of cooperative law: strictly abiding by the cooperative principles, but mostly *ius dispositivum*, on the one hand, and less strictly abiding by the cooperative principles, but mostly *ius cogens*, on the other hand. These correlations might need researching in themselves, as also in relation to each other, not least in order to find out the reasons for these evolutions in legislation and the consequences.

Finally, a number of phenomena not directly related to cooperative legislation need mentioning as they – *ceteris paribus* – reinforce this alignment: the stock companization of cooperatives is part of a wider process of standardizing all enterprise types on the features of stock companies and not only cooperatives, leading to a legal isomorphism of enterprise types. In fact, this process is part of the wider phenomenon of standardizing laws.³⁹ Comparative legal science partly supports this phenomenon. It continues defining its task as that of assisting lawmakers in harmonizing and unifying laws. Where comparative lawyers conceive these processes as standardization, they join hands with those who see in law, especially in the plurality and diversity of laws, costs to be reduced.⁴⁰

Each of these approximation processes has positive and negative effects which mitigate/reinforce each other in a highly complex manner, different from one

³⁹ See Henry, Kulturfremdes Recht erkennen. Ein Beitrag zur Methodenlehre der Rechtsvergleichung, pp.111 ff. See also Simmons, Richard, "Cooperatives and Policy Transfer". Contribution to the 2011 Global ICA Research Conference on "New Opportunities for Cooperatives" 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings.

⁴⁰ Schanze (introducing a new curriculum on the economic analysis of law) writes: "Grundeinsicht (für das Studienprogramm) ist, dass rechtliche Institutionen nicht nur Rahmenfaktoren ökonomischer Entscheidungen sind, sondern vielmehr kostenträchtige Variablen."

jurisdiction to the other.⁴¹ By its very nature, the alignment of cooperative law with stock company law has more complex effects than the two other processes. On the one hand, it helps cooperatives to become more competitive in the narrow econometric, financial sense of the term, i.e. to grow economically, to increase their capital through mergers, to lower their costs, to create economies of scale, to increase their reserves and to increase their profit, at times also their surplus. However, by impacting on, at times by changing the cooperative specific capital structure, management and/or control mechanisms, the differentiation between cooperatives and stock companies fades and lawmakers violate their obligation under public international cooperative law to (re-) establish and maintain the identity of cooperatives.

However, the violation of public international cooperative law is not a sufficient argument against the companization of cooperatives through legislation. The politics/law nexus makes legal arguments compete with political ones. What constitutes a genuine cooperative is not a matter for law alone to say, nor is it a matter for politics alone to say.⁴² Positive law which regulates types of enterprises, be it national law, including constitutions, regional or international law,⁴³ is no guarantee that its contents will not change over time.⁴⁴ It is quite a different matter whether existing individual enterprises enjoy such a guarantee by virtue of general legal principles. Likewise, the fact that one billion people the world over choose to be members of a cooperative, and supposing they opted for being

⁴¹ The unification of special laws applying to different types of cooperatives at national level helps to create policy coherence, to reduce bureaucracies and to strengthen cooperative autonomy. The unification and harmonization of cooperative laws across national borders might at times be necessary in order to restore and maintain competitiveness in the mainstream econometric-financial sense of the term, in order to facilitate beneficial regional and international (economic) integration and trade and to reinforce the cooperative unity across borders. However, processes of unification and harmonization consist more often than not in the transfer of law(s) from one country to another. There are many reasons for this. Some laws have the reputation of being “good” laws and this “best technology” is a must. The underlying reason is, however, that legislators must not experiment. This is why they prefer to rely on tested models, even if these operate in other socio-economic contexts and, more often than not, in different historical contexts. Thus, national specificities are neglected, defaulting implementations of the law are likely to occur and, hence, cooperative potentials are likely to remain underutilized, if not unutilized.

⁴² As for formal legislative policy matters, suffice it to mention this: it might not make legislative sense to have one law on stock companies and one on cooperatives, each allowing an enterprise registered on its basis to structure itself and operate in a way enterprises registered on the basis of the other law can. The principle of the economy of legislation (Montesquieu) might be violated, but nothing contra legem can be seen in that. However, clarity and guidance for (potential) cooperative members, third parties and administration are lost in such a constellation. Likewise, “flexible” laws, containing few mandatory rules only (quantitative term used here to demonstrate the case, not to imply that the quantity of such rules would be relevant for the argument), and which do not but confirm the freedom of association, are not contra legem, but possibly superfluous.

⁴³ For example Article 54 (2) of the Treaty on the Functioning of the European Union (TFEU) and ILO R. 193.

⁴⁴ The growing number of constitutions which recognize cooperatives as a distinct enterprise type makes it at least more difficult to change national laws to the disadvantage of cooperatives. See Montolio, *Legislación cooperativa mundial. Tendencias y perspectivas en América Latina*, p.245.

members of a genuine cooperative, bears no more normative power, if any at all, than the stated economic reasons for further companizing cooperatives.

The following section looks into the policy/law nexus. According to the principle of the rule of law, law takes precedence over politics until such time as politics decides to change the law through a process pre-established by law.

3. THE VIABILITY OF COOPERATIVES IN THE GLOBAL ECONOMY AND LEGAL POLICY ISSUES

The current contradictory evolution of cooperative legislation has led to a crossroads. Lawmakers must decide in which direction to turn:

- towards further companization
- back to a cooperative law which translates as closely as possible traditional cooperative principles, or
- towards a new cooperative law.

The first option finds its limits in legislative logic as it might make cooperative law redundant.

The others are indeed options, but raise a number of questions. Do we have legal principles which could bridge the gap between the universally recognized cooperative principles and law?⁴⁵ Do we have the necessary legal knowledge to create new cooperative law?

I suggest legal policy-makers use globalization and the sustainable development paradigm as keys when reflecting these issues.

3.1 Globalization

The most decisive element of globalization⁴⁶ for cooperative legislation is a double shift of emphasis in the economy from the production of goods and services to the highly capital intensive and high value-adding production of knowledge⁴⁷ and from the internationalization of trade of goods and services to the globalization of the production itself. Without neglecting more traditional economic activities, it is fair to say that this double shift is likely to set the parameters for the direction of legislation.

⁴⁵ This is one of the concerns of the Study Group on European Cooperative Law, SGECOL. In a first phase the Group will elaborate, on the basis of comparative studies, “Principles of European Cooperative Law (PECOL)”. See at: www.euricse.eu/en/node/1960.

⁴⁶ For the definition, see Box 4.

⁴⁷ See Simon, Herrmann, Abends verlässt das Vermögen die Firma, in: Frankfurter Allgemeine Zeitung, 8.3.2010, p.14.

Box 4: Globalization

Globalization stands for the process of the abolition of barriers to the movement of the means of production, especially capital and labour.

Source: With slight changes this definition is borrowed from Becerra, p.14.

This shift favours capital based companies and those which are highly mobile, i.e. it apparently works to the disadvantage of cooperatives. It allows global producers to free themselves from time and space constraints, i.e. from the classical theatre-like production mode where the skilful accommodation of the unity of space, time and action was key to success.

At the same time, the globalization of production dissolves the unity of economic, political and legal spaces. Global actors fall outside the realm of law, just as do the growing number of informal economy actors.⁴⁸ Lacking global lawmakers and global law enforcement mechanisms, we have no global law (yet). Instead, national, regional and international laws “compete” with global standards set by private actors. The political space, the space of law and democracy, is shrinking and is being privatized.⁴⁹

The weakening of law in general has multiple effects on cooperative law. Where law weakens, it becomes difficult to build institutions based on law. Where law weakens, collectivity constituting solidarity, in addition to corporate social responsibility (CSR), is difficult to generate and regenerate. Where law weakens, government is deprived of its finest instrument to implement policies.⁵⁰

While production becomes diffuse and partly virtual, living tends to concentrate more and more in urban areas, exacerbating the effects of unbalanced and uneven demographic developments within countries and across borders; migrations-induced interculturalities add to the complexity of these situations. The combination of these factors prompts the already widespread individualization of human beings to turn into a singularization of the individual.⁵¹ This singularization is another factor which makes institution building difficult, especially institutions that rely on the solidarity of their members.⁵²

⁴⁸ See below Part 2, Section 3.2, Informality and cooperative law.

⁴⁹ See Part 4.

⁵⁰ While the change of the role of the state has been portrayed in the Introduction to the 2nd edition of the Guidelines as one of the reasons which justified the revision of the Guidelines, the change indicated here is of a different quality altogether if we consider the rule of law as central and if we define the state as law.

⁵¹ See Rosanvallon.

⁵² Montolio, *Legislación cooperativa mundial. Tendencias y perspectivas en América Latina*, at footnote 7 cites Touraine and writes: “La globalización significa [...] la desvinculación entre actores y instituciones.” An early analyst of this was Miguel de Unamuno. See also Rosanvallon.

But global, capital intensive production, intercultural and singularization are as much a challenge for cooperatives as they are a chance for them. The high value-added production of knowledge is not only highly capital intensive, but it is also brain worker dependent. It is no coincidence that more and more brain workers organize in the form of cooperatives.⁵³ As people centred enterprises, cooperatives have thus not only a comparative competitive disadvantage, but also an advantage. Interculture is a source of knowledge. Singularization might be a good match for virtual enterprises where connectivity counts more than collectivity. It might well be that collectivity engendering solidarity is not a necessary ingredient of cooperatives (any more).

The viability of cooperatives in the global economy is best demonstrated by new and successful forms having developed under the conditions of a global economy. Some still rely more on solidarity, but move from single purpose to multipurpose approaches and from homogeneous memberships to multi-stakeholder set-ups serving either their members or/and non-members. This can be the case for social cooperatives (schools, care cooperatives, health cooperatives) and community cooperatives (including utilities, for example energy cooperatives and general interest housing cooperatives). Some already rely more on connectivity: agricultural cooperatives in urban agglomerations, liberal professions, think tanks, research institutions, open source programme sharing schemes etc.

3.2 Sustainable development

The other key to interpreting the circumstances which need reflecting in legal policy-making is sustainable development.

Based on the *Report of the World Commission on Environment and Development*,⁵⁴ the so-called Brundtland Commission,⁵⁵ the UN adopted in 1992 the Rio Declaration on Environment and Development.⁵⁶ Principle 27 of the Declaration enshrines the sustainable development paradigm. The Rio Declaration is generally seen as having introduced sustainable development into (international) law. The roots of sustainable development as a legal concept reach back to the UN development strategies for the four (post-colonial) development decades (1960-2000). The commitment of almost all UN member States to the Millennium Development Goals (MDG) in 2000 symbolizes the end of this approach and turns towards a more action oriented approach. It marks indeed the end of the “developed/developing” countries divide. ILO R. 193 reflects this by addressing all member States of the ILO.

⁵³ See Troberg.

⁵⁴ UN Report on Environment and Development, 4.8.1987 UN Doc. A/42/427.

⁵⁵ The report of the Commission became known under the title “Our Common Future”.

⁵⁶ UN Report of the UN Conference on Environment and Development. Annex I: Rio Declaration on Environment and Development, 12.8.1992, UN Doc. A/Conf. 151/24 (Vol.I); Annex II: Agenda 21, 12.8.1992, UN Doc. A/Conf.151/26 (Vol.II).

The first decade of this century sees the sustainable development concept extend to include not only ecological aspects, but also social and economic ones. Implementation policies and strategies take the interdependent and mutually reinforcing nature of these aspects into account. The World Summit on Sustainable Development in Johannesburg in 2002 set the stage. The international financial institutions, the UN, the G20 (Group of 20) and the Organization for Economic Cooperation and Development (OECD) and others include the concept in their policies. Resolutions of international and regional organizations, international treaties, for example the UN Framework Convention on Climate Change, the Convention on Biological Diversity, the Agreement establishing World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), the Treaty on the Functioning of the European Union (Article 11 TFEU) and even national constitutions, for example the Constitution of Switzerland (Article 2), do likewise. In 2002 the International Law Association established its Committee “International Law on Sustainable Development”.⁵⁷ In 1997 the International Court of Justice (ICJ) recognizes sustainable development as a “concept of international law”.⁵⁸

Noteworthy too is the seventh cooperative principle (Concern for Community) which states, “Cooperatives work for the sustainable development of their communities through policies approved by their members”. As the cooperative principles are an integral part of the ILO R. 193⁵⁹ and since ILO R. 193 is legally binding, these principles are part of law. In addition, Paragraph 4 (g) of ILO R. 193 recognizes the potential of cooperatives to contribute to sustainable human development and recommends promoting this potential.

The concept of sustainable development serves to assess the degree to which a certain behaviour, policy or action conforms to the requirements of sustainable development. The effectiveness of the concept will depend on whether and to what extent it evolves into a legal rule. The debate on Corporate Social Responsibility (CSR) centres on this question. The further question treated here is whether there is a functional relationship between the legal structure of cooperatives and their contribution to sustainable development.⁶⁰ Given the legal nature of the concept of sustainable development, the question is of course relevant in itself. The approach to looking at the legal structure of cooperatives is not to replace the CSR approach; it is to strengthen and to complement it.⁶¹ Both

⁵⁷ See Report of its sixty-ninth conference in London in 2000.

⁵⁸ See Case *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment. I.C.J. Reports 1997, Paragraph 140.

⁵⁹ See its Paragraph 3 and its Annex.

⁶⁰ See Henry, “The Legal Structure of Cooperatives: Does it Matter for Sustainable Development?”.

⁶¹ As concerns this complementary function, see Javillier.

approaches are based on the premise that the concern for sustainable development needs translating to the enterprise level.⁶² The difference is that:

- CSR concerns the behaviour of enterprises as subjects of (public international) law
- the legal structure approach, as dealt with here, is to channel this behaviour (strengthen the CSR approach) and
- the legal structure approach focuses on lawmakers and law enforcers as primary addressees (complement the CSR approach).

The hypothesis is that the legal structure of genuine cooperatives lends itself to making a contribution to sustainable development and that the companization of cooperatives weakens this capacity.

The following arguments are no more than indications that the hypothesis is worth verifying/ falsifying. The argumentation is however tainted with a serious epistemological flaw. The arguments are based on an ideal type of cooperative law, the justificatory basis of which is fading with the very companization of cooperatives through legislation. This has to do with the link between national and regional law, on the one hand, and public international law, on the other. If the former drifts away from the obligation derived from the latter to maintain the cooperative identity, the former cannot be used to substantiate the argument that the latter has indeed the quality of law.

This epistemological flaw qualifies the question as one of legislative policy, since cooperative members' interests and third party legal interests in the preservation of the cooperative enterprise type are not at stake. They can be secured through other means, the Human Right to associate for the former, and any type of legal person for the latter. But beyond these two types of interest, there is a public policy issue. The policy debate needs to weigh the rationale for companizing cooperatives through legislation against public concerns, such as sustainable development.

Supposedly, companization is a measure to meet the requirement of equal treatment of all enterprise types and to allow cooperatives to become/remain competitive. The argument is doubtful in itself as it continues reducing

⁶² The 96th session of the International Labour Conference (ILC) 2007 endorsed the goal of sustainable development (see ILC 96-PR 15-2007-06-0102-Fr.doc. Introduction, Paragraph 8; Conclusion Paragraph 3) and linked it to the enterprise promotion by the ILO.

competitiveness to aspects where capitalistic companies excel, i.e. to financial aspects. In addition, these financial concerns are losing their place as solely important criteria, especially when it comes to the driving force of the economy, namely the capital and brain worker intensive global production of knowledge.

The wider policy debate needs to address the effects of the companization induced isomorphism of enterprise types, as frequently this companization argument is countered with the question: “So what?” And so, the following question arises: for what do we need cooperatives? The immediate answer is that we need them because apparently they are part of a diversity of enterprise types which correlates with needs, aspirations and preferences, the satisfaction of which they address in diverse ways. This answer stems from the empirical, historical fact that needs, aspirations and preferences have always been diverse. Precisely because of that, diverse enterprise types developed. It is doubtful, however, whether one may extrapolate from past experience to a future need for cooperatives. And, more fundamentally, the question arises whether an isomorphism of enterprises can be a means to address the overall need, namely that of sustainable development. Sustainable development presupposes development. The only source of development/life is diversity. Diversity has two aspects: biological diversity and cultural diversity. Without cultural diversity, including in the field of law⁶³ and enterprise types,⁶⁴ biological diversity might be protected, but it cannot be preserved. Without biological diversity most of the technological advances would not have been and will not be possible. It is difficult to imagine how societies could have developed without cultural diversity. The need to develop sustainably is thus a qualitatively different type of need than the needs which historically animated the search for adequate enterprise types. It is an existential need in the sense that the denial of its satisfaction is equivalent to the impossibility to pursue the satisfaction of any other need. This is the kernel of development which seems to become a universally accepted insight again.

The principle of diversity does not call for the preservation of specific, existing types of enterprises, cooperatives in our case. It calls for the preservation of the possibility for different and diverse types of enterprises to exist. Development is its possibility. This possibility is best served by the greatest possible number of enterprise types. This number is a function of the knowledge about different and diverse types of enterprises. This knowledge (re-) generates through the experience with real,

⁶³ For the idea in general see Gruzinski, *La pensée métisse*; Gervereau; Martí. For more details see Henry, *Kulturfremdes Recht*, especially D III. For the importance of law in this context, see Blackburn, pp.39 ff.; Henry, *Aktuelne tendencije*, p.49.

⁶⁴ As for the stabilizing effect of a diverse banking system, for example, see Burghof; Groeneveld, Hans, “The value of European Cooperative banks for the future financial system.” Contribution to the 2011 Global ICA Research Conference on “New Opportunities for Cooperatives” 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings.

existing types. This is why we need to “preserve” them. This seems to be a contradiction, but it is not one. We have no means to preserve diversity as such.

Postulating a primacy of the principle of diversity over the preservation of existing types of enterprises is to also caution against any attempt to petrify existing types. They need developing. They develop only as part of a diversity of, and with, other types.

The following ideas set out to verify the hypothesis that the legally structured enterprise type “cooperative” lends itself well to contributing to sustainable development. There are sufficient *indications* that this hypothesis could hold true. The arguments put forward are legal-normative in nature. Most of them must therefore not be construed as a report on the empirical structure-induced behaviour of cooperatives. They do not but underline the potential of cooperatives. For lawyers, the questions are whether the structure of cooperatives, prescribed by law, is compatible with sustainable development, whether cooperative law orients cooperatives to work towards this end and whether cooperatives can be compelled through legal means to do so where deviations give rise to concern by legally interested parties. This last point is of particular importance in the debate on so-called corporate social responsibility or corporate societal responsibility. It might well qualify as an important distinguishing feature of cooperatives.

Generally, three *aspects* of sustainability are put forward: economic security, ecological balance and social justice. I add political stability as a fourth one. There is a partial overlap of arguments when comparing the relation of the legal structure of cooperatives to these aspects with that of stock companies.

3.2.1 Economic security

Cooperatives create economic security mainly through their economic stability, not least in times of crisis. Their economic stability is indicated by their longevity and a low number of bankruptcies.⁶⁵ Structural and other features induce this.⁶⁶

⁶⁵ See for example, a study by the Ministry of Economic Development, Innovation and Export, Government of Quebec, at: [http://www.mdeie.gouv.qc.ca/index.php?id=187&tx_ttnews\(tt_news\)=1069&tx_ttnews\(backPid\)=2206&tx_ttnews\(currentCatUId\)=75](http://www.mdeie.gouv.qc.ca/index.php?id=187&tx_ttnews(tt_news)=1069&tx_ttnews(backPid)=2206&tx_ttnews(currentCatUId)=75)). According to unverified reports, the German Federal Statistics Office (Statistisches Bundesamt) confirms the Canadian statistics.

⁶⁶ See Box 5.

Box 5: Features of cooperative enterprises that contribute to economic stability and resilience

- Economic stability over time is the result of adaptability which, in turn, is a function of the response to changing and effectively and democratically expressed needs of the members.
- As capital requirements are low and the acquisition of skills (where necessary) is possible in most instances, cooperatives are a rather easily accessible organizational form which may be registered as a legal entity, thus adding an element of stability. Contrary to a widespread belief, “easily accessible” must not be construed as “simple organizational and operational form of enterprise”.
- Registration not only confers recognition as legal entity by business partners, it operates also a widely unknown and underestimated shift of economic risks, which can boost entrepreneurial behaviour and thus add to economic security. To my knowledge, the link between the attribution of legal status to entities, on the one hand, and risk behaviour as well as development, on the other hand, is seldom discussed. Fikentscher frequently mentions this link (see Fikentscher, Wolfgang. 1995. *Modes of Thought*. (Tübingen, Mohr.) pp.183 et passim). See also the writings of Mary Douglas; Javillier. Such shifts require efficient lines of responsibility and liability within the cooperative structure in order to live up to the trust business partners put into cooperatives as legally recognized enterprises.
- Cooperatives have low transaction costs because the members are also the main users. See Seiser; Watkins, pp.54 ff.
- The costs caused by complex democratic decision-making processes are outweighed by the advantages of these processes (see aspect of “Political stability” below) and they may be held low by providing for an efficient power sharing between the different organs of the cooperative. Democratic participation in economic decision making at the enterprise level does not diminish the competitiveness of these enterprises (see 2007/08 Competitiveness Report; Bernardi, p.16)
- Cooperatives can generally count on member loyalty and hence user loyalty and commitment.
- Cooperatives have an inbuilt early warning system through regular cooperative specific financial, management/performance, social (see Seiser), societal audit and professional advice. This is true, of course, only where law does effectively regulate audit, meaning where in addition to the respective rules, efficient implementation mechanisms are in place. As for the societal audit, see Münkner, “Bilan sociétal - ein neuer Ansatz zur Messung des Erfolgs von Genossenschaften in Frankreich”.
- Cooperatives avoid the negative sides of the conflict between investor interests and member user interests through the limitation put on the admission of investors, be they members of the cooperative or not.
- Cooperatives are meant to prefer the production of surplus (on transactions with members according to special cooperative cost calculation schemes) over that of profit (on transactions with non-members according to commercial principles).
- Most cooperatives are human being-centred. This helps them adjust to changing circumstances (see above for their stability in time), especially to the current change in the leading production pattern, from that of goods and services to that of knowledge and from that of physically fixed to virtual enterprises (see above concerning globalization, Part 1, Section 3, The viability of cooperatives in the global

Box 5: Features of cooperative enterprises that contribute to economic stability and resilience (*continued*)

economy and legal policy issues). While it is true that cooperatives face difficulties when it comes to capital intensive activities, such as the production of knowledge, as their capitalization suffers from drawbacks (voting rights are not proportional to the investment, and non-member investments - even non-member business - are restricted), it is equally true that the production of knowledge depends on human beings, as knowledge is generated, applied and transmitted by them and here cooperatives have a comparative advantage. See the inspiring article by Snaith. Similar, but limited to the argument that knowledge intensive enterprises will have an advantage in the future, if they do not have it already now. (Bernardi, p.18).

- Cooperatives are often tied into legally structured, inter-cooperative solidarity mechanisms, for example guarantee funds which operate in case of financial difficulties. See *Frankfurter Allgemeine Zeitung*, 7.10.2008, 21: "Nach 1930 hat kein Kunde oder Gläubiger einer Volksbank durch Bankinsolvenz Geld verloren."; "Die verschärften Eigenkapitalregeln".
- Cooperatives have a capital structure which guarantees that the main constituent parts of it, namely member shares and reserve funds, are not mobile: usually, member shares cannot be transferred and traded and reserve funds are at least partly indivisible/locked-in. Both factors add to local stability. See Jeantet. The same point is also stressed by the World Commission on the Social Dimension of Globalization, Geneva: ILO, 2004 (see *A Fair Globalization: Creating opportunities for all*, especially Paragraph 307). Unlike stock companies, cooperatives cannot easily delocalize their business.
- Cooperatives tend to reinvest the positive results of their activities at the local level where their members are, thus impacting positively on local economies. This, in turn, helps them to develop themselves. As an example one may cite the Italian legislation whereby the members of cooperative banks must have a territorial bond. For further examples, see Bernardi.
- Voting rights, and thus control, cannot be acquired by buying shares, but only through membership.
- The locked-in capital of cooperatives (indivisible reserves), while controlled by the members, cannot be accessed by them.
- Cooperative managers must ensure that the reserves serve both current and future members. Interestingly, this intergenerational aspect was also at the origin of the sustainable development debate. It adds in most cases to the economic security of local communities.
- With regard to financial cooperatives: as those depositing their savings with a cooperative bank or a cooperative savings and credit institution are potentially also borrowers, and as they participate in the decision-making processes, their risk assessment, concerning both lending and investments, differs from that in investor driven banks. The rather stable situation of cooperative financial institutions in the current crisis might be partly explained by this (not only in times of crisis).
- In general, risk assessment is facilitated through enterprise policies which limit financing to local projects. (See for example the bylaws/statutes of the Raiffeisen banks in the Canton of Geneva, reported by the daily newspaper *Tribune de Genève*, 25.3.2009, p.9).

3.2.2 Ecological balance

The ecological balance is maintained more easily by enterprises, like cooperatives, which are not legally required to maximize the financial return on investments, returns which are produced by using non-renewable energies. Again, a number of structural and other features of cooperatives do induce this.⁶⁷

Box 6: Features of cooperative enterprises that contribute to ecological balance

One of the features which allow cooperatives to further social justice is their balancing of cooperation and competition. This also goes a long way towards preparing the ground for a heightened concern for keeping the ecological balance. Furthermore, cooperatives contribute to maintaining the ecological balance through the following features, among others:

- by being member-centered. This ensures that decisions concerning the operations of the cooperative enterprise are more comprehensive than those in capital-centred companies. Cooperatives do not allow for “economy or ecology” solutions. They have to find rather “economy and ecology” solutions
- by being member-user driven. Members constantly redefine their needs and, in doing so, most probably include their concern for a healthy environment and the sustainable use of natural resources. Members are likely to make decisions that balance their welfare with the need for profitability. The example of Migros Cooperative and its consideration for biological diversity in the supply chains of its consumer cooperatives may serve as an example. See *Migros magazine*, 8.9.2008, p.37
- by neutralizing the role of capital. Growth is commonly defined as the result of a favourable combination of capital, technology and labour. The finite character of natural, non-renewable resources, which are at the basis of most of our production, is not part of the “equation”. Where the role of capital is neutralized, i.e. where the financial return on the investment, which is taken as the main indicator of growth, is not the primary goal of the enterprise, and where production is demand-driven, instead of supply-driven, the pressure to utilize these resources to achieve growth lessens. Despite more environmentally friendly technologies, which have been developed over the past decades, and which have allowed for productivity gains by using fewer resources per unit, the fact remains that the energy consumption increases through the cumulative effect of an increasing energy consumption per capita and the increase in the number of people living on this planet. See Becerra, p.97; Schiffer
- by intergenerational solidarity. Another element which helps to maintain the ecological balance is the intergenerational solidarity achieved by the nature of the reserve fund being indivisible, it being fuelled by the totality of the profit and parts of the surplus (see Part 3, Section 6.2, Surplus distribution), as well as by the obligation of the responsible persons to manage the assets for future members also
- by pooling activities. For example, the common transport of goods diminishes pollution. Transport cooperatives, like the Swiss cooperative “Mobility”, are examples where this is a side effect of their main objective. (Idea borrowed from Andreas Kappes during a training course at the ITC, the International Training Centre of the ILO in Turin)
- by introducing a societal audit which comprises ecological assessments of the performance of cooperatives. See Münkner, “Bilan sociétal”.

⁶⁷ See Box 6.

3.2.3 Social justice⁶⁸

Social justice materializes where the Human Right to participate in the decision-making concerning the production and distribution of wealth materializes. Enterprises with a democratic structure, like cooperatives, dispose of the necessary organizational set-up to organize this participation.⁶⁹ It is a central idea of the ILO Constitution not to let economic and social development drift apart, whence the ILO engagement in cooperative development in general and in cooperative legislation in particular.

Box 7: Features of cooperative enterprises that contribute to social justice

Social justice has two aspects: social needs satisfaction and social equality.

Among others, the following features ensure that cooperatives take the social needs of their members into consideration:

- the universally recognized definition of cooperatives requires them (legally) to satisfy the “economic, social and cultural needs and aspirations of the members.” (see for example ILO R. 193, Paragraph 2)
- the members themselves define these needs and the ways to satisfy them. The extent to which cooperatives are successful in achieving this objective is assessed through the cooperative specific audit

⁶⁸ For the relationship between law and social justice it is worthwhile reading Supiot, *L’esprit de Philadelphie. La justice sociale face au marché total*; idem, *Contribution à une analyse juridique de la crise économique de 2008*. This relationship also clarifies the difference between social justice, on the one hand, and charity and CSR, on the other. For the structural elements, see Box 7.

⁶⁹ For example because of the identity principle, those who rule and those who are ruled in cooperatives are potentially the same persons. The division of roles underlying the governance concept with its potential conflicts does not exist in cooperatives, at least not as markedly as in other business organizations. Other structural features of good governance are:

- the division of powers and functions among the various groups within the cooperative and the reciprocal checks by these groups on each other, as well as the fact that the “ruled” have the right to elect their “rulers”. This latter feature seems to be systematically overlooked when comparing the governance structures of different enterprise types
- democratic control of the cooperative enterprise by the members is required by the definition of cooperatives and by the cooperative principles
- a specific self-control mechanism at all levels (primary, secondary etc.), which not only ensures sustainability, but also autonomy and independence from any outside interference
- a democratic structure. Self-determination, autonomy through the setting of own rules (bylaws/statutes), self-management, voting according to the principle of one member/one vote, participation of the members in all phases of the operations of the cooperative, the principle that cooperatives should cooperate instead of concentrate, allowing for the maintenance of the autonomy of the partners (see ILO R. 193, Paragraph 6. (d)) etc. and finally
- a high Human Rights functionality of cooperatives. See Partant; Henry, *Cooperative Law and Human Rights*; Laville.

Box 7: Features of cooperative enterprises that contribute to social justice (continued)

- the objective of cooperatives is member promotion, not the maximization of financial returns on financial investments
- the “growth or equity” alternative is leaning towards equity, as the role of capital is neutralized
- decisions are taken according to the one member/one vote principle, independently of the amount of capital “invested” by the members
- profits are not distributed. Surplus is distributed, not in proportion to the financial “investments”, but in proportion to the transactions with the cooperative
- the characteristics of the main constituent parts of the capital, member shares and reserves, prevent - as mentioned – dislocation and allow therefore for a better account of local social needs
- many cooperatives provide for social security coverage for their members by setting aside parts of the surplus for this purpose. Some texts do require this. See for example Article 42 of the 2008 Ley marco para las cooperativas de América Latina (see Part 2, Section 4.1.2.1 Ley marco para las cooperativas de América Latina)

Cooperatives render **social equality** through, among other means:

- an equitable cost, risk and benefit sharing and co-control by the members, independently of their financial “investment”
- the open door principle (the so-called “open door principle”, the first ICA principle), is frequently construed as meaning that anybody can join a specific cooperative. It is therefore worthwhile recalling the full text of this principle. It reads: “Voluntary and open membership. Cooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination”.
- The open door principle allows for the creation of economies of scale and, given the objectives of cooperatives, as well as their surplus distribution schemes, for a more widespread distribution of wealth and thus social equality (see argument at the end of this Section). This is a structural means for an effective materialization of the right to participate in political decision-making processes: create the necessary economic power for the greatest possible number of citizens, which is necessary to enable people to make meaningful use of this Human Right. The need to reduce poverty is therefore for cooperatives a sign of failure, as they might not have been successful in preventing their members from falling into poverty in the first place. Their approach is one of poverty prevention, only subsidiarily one of poverty reduction
- the focus of cooperatives on their members, mainly natural persons
- the direct access of members to the knowledge, as well as the research and development results engendered by their cooperative and
- the balance of cooperation and competition.

3.2.4 Political stability

Political stability is added as a fourth aspect of sustainable development as it is inextricably linked with social justice. Political *instability* is much less the result of poverty than the result of social injustice. Political stability, on the other hand, is a function of social justice and the possibility of participating democratically in decision-making processes which affect everyday life. Participation is an inbuilt structural element of genuine cooperatives. Given that the spaces where democratic participation can be organized are shrinking, enterprises of the cooperative type will play an increasingly important role in maintaining political stability.

One might add a macro-economic argument to support the social justice/political stability nexus by repeating that approximately one billion people around the world are members of a cooperative. If one adds their economic dependents, one may assert that between one third and one half of the world population improves its livelihood through cooperatives, whereas only some 330 million people hold shares in stock companies.

4. CONCLUSION OF PART 1

Part 1 was about finding an answer to the question: “Why cooperatives?” The suggested answers are: We need the comparative advantages of cooperatives in the global economy. We need their legal structure in order to be more efficient in the pursuit of the sustainable development imperative. These answers imply a call for ending the companization of cooperatives through legislation. The following Parts go on to suggest how this can be done

Part 2: What are cooperatives? Why legislate on cooperatives? What kind of cooperative law?

“La simple existence d’une institution n’est [...] jamais suffisante à elle seule; pour compléter le processus, il doit s’y ajouter la force de la loi. C’est le rôle du juriste d’œuvrer les détails des structures institutionnelles dans la société.” (William Barnes⁷⁰).

1. GENERAL

The challenges of globalization for the economy and for political orders impact on cooperatives and have already led, as mentioned, to the formation of new types of cooperatives in addition to the traditional ones. The cooperative lawmaker will have to consider whether the following underlying shifts require special reflection in the law. Shifts from:

- agricultural via rural to urban
- goods and services-providing cooperatives to brain worker cooperatives
- economically oriented to social and community oriented cooperatives⁷¹
- single stakeholder (homogeneous)/single purpose to multi-stakeholder (heterogeneous, including private-public partnerships)/multi-purpose cooperatives transacting also, or exclusively, with non-members, and/or (also) serving non-members’ needs.

Taking these shifts into account would mean departing from some traditional assumptions on which grew a rich institutional cooperative experience. Apart from the difficulties and risks involved in any change to principles-based institutional experiences, modifications would mean more than cosmetic adaptations.

The structure of cooperatives has traditionally translated the self-help approach into real results. The identity principle governed the functional link between the two aspects of cooperatives, namely a group whose members use the services provided by their enterprise. This principle might require reviewing. In reality,

⁷⁰ Barnes, p.570.

⁷¹ See below Part 2, Section 2.1, Cooperatives and social economy enterprises.

the model has already adapted as we see for example from social economy actors using the cooperative model and from the utilities sectors.

The question is whether this reorientation merely recognizes the process of allowing more and more non-member service and leads it to the extreme where a cooperative could also serve exclusively the needs of non-members or whether this constitutes giving up the basics of cooperative thinking. The cooperative form functions well to translate the self-help approach into reality. Reality shows that it can also function well to translate other approaches. This is supported by the shift toward conceiving the founding of cooperatives as a free choice rather than only as a necessary “choice” (“children of choice” and “children of necessity”). In this case, the cooperative distinctiveness as compared with other enterprise types would be reduced to its specific structure, especially as far as governance, capital and control are concerned. This raises the question “what are cooperatives?” The following “answer”, and also Part 3, “An ABC of a cooperative law”, are based on the rather conservative approach of seeing cooperatives as member-user driven enterprises. The consequences of the above discussion on the cooperative approach in terms of legislation are more alluded to than sufficiently reflected, as the discussion itself is still open.

2. WHAT ARE COOPERATIVES?

If we want to legislate on cooperatives - old or new, old and new - we obviously need to know what cooperatives are. The diversity of opinions of what cooperatives are, or should be, guarantees that an assumed essence of cooperatives is not set in stone.

Essentialist views on institutions are detrimental to their evolution. But, if and as long as we have an agreed upon legal definition, this diversity of opinions has its place in a political discourse and not in cooperative lawmaking. This legal definition is contained in ILO R. 193. As mentioned, ILO R. 193 is the nucleus of the public international cooperative law. Its Paragraph 2 states: “[...] the term “cooperative” means an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise”.

This definition, or any adaptation of it, must not be understood as simply a definition. Rather, the definition guides the legislator in the formulation of all parts of the law. It is not self-explanatory. The cooperative values and principles referred to in Paragraph 3 of ILO R. 193 and included in the Annex to ILO R. 193 help understand the definition, but fall short of delivering sufficient elements for the formulation of legal principles which could guide the cooperative lawmaker.⁷²

⁷² See above at footnote 45.

Two main historical phenomena further complicate cooperative lawmaking: firstly, the renewed discussion on the social economy mainly as a consequence of the inability of states to continue providing public services, in turn mainly a result of globalization; secondly, the predominance of the stock company as the model which shapes our way of conceptualizing enterprise types. The above-described companization of cooperatives reduces the world of enterprise types to one model. It is part of an epistemological crisis.⁷³ It needs overcoming.⁷⁴

To better understand what cooperatives are, a brief discussion ensues on distinguishing them from social economy enterprises as an assumed close phenomenon on the one hand, and from stock companies, as an assumed distant type, on the other. The comparisons are asymmetrical. The first relates a legal type - cooperatives - and a wider phenomenon the debate of which has not (yet) led to the recognition of a special social economy legal type.⁷⁵ The second relates to two legal types. Cooperatives and stock companies are recognized by most, if not all, legal systems as legal entities.

2.1 Cooperatives and social economy enterprises⁷⁶

It is important to understand the reasons why the debate on the social economy has re-emerged.⁷⁷ We are experiencing an unprecedented social, societal and

⁷³ See Henry, *Cooperatives, Crisis, Cooperative Law*. For an explanation of the term “crisis”, see Serres.

⁷⁴ In this context the following might be worth considering: the beginning of the stock companization of cooperatives through policies and legislation in the 1970s is concomitant with three phenomena. More or less at the same time, and only then, economics started developing a systematic interest in the subject of enterprises. Until then, the interest had concentrated on the figure of the entrepreneur, the single entrepreneur that is (see Barreto, p.187). The economic analysis of law became prominent, not least through Posner’s seminal work on the economic analysis of law (see Posner) and the rapid overcoming of the so-called oil crisis prevented serious consideration of the publication in 1972 of the “Limits of Growth” (Report of the Club of Rome. See Meadows et al.). The report demonstrated the limits of growth, if derived from the use of non-renewable energy sources, mainly crude oil.

In order to overcome this intellectual crisis the first step is to revisit the term “efficiency” on the basis of a comparison of enterprise types using two methods: comparison on criteria which are not their definitional features, but relate to a tertium, and comparison with one another (*secundum comparationis*). The first method is to prepare policy choices of the above-mentioned kind; the second is to sharpen the profiles of enterprise types and thus serves legislation.

⁷⁵ See for example the 2004 British Act on Community Interest Companies, the 2003 Finnish Law on social enterprises (Laki sosiaalisiin yrityksiin 1351/2003), the 1991 Italian Law on social cooperatives (Law No.381) and the Spanish Ley 5/2011 de Economía Social (Law on social economy).

⁷⁶ This contribution is a limited account. As far as the empirical data is concerned, it is mainly limited to the evidence reported in the literature. The author has had some first-hand observation of social cooperatives in the Torino region. As far as legal questions are concerned, this is limited to public international law, to the law of the European Union and to the law of some European Union Member States. For more details, see: CIRIEC España; Defourny; Defourny & Develtere; Defourny & Monzon Campos; Defourny & Nyssens; OECD; De Poorter.

⁷⁷ See Jeantet; Münkner, “Panorama d’une économie sociale qui ne se reconnaît pas comme telle: Le cas de l’Allemagne”. As early as 1905 Gide (see Gide) wrote: “Social economy does not rely on the free play of natural laws to assure the welfare of mankind, but it believes in the necessity of a wanted, reflected and rational organization which conforms to a certain idea of justice.”

political exclusion of large numbers of people across the globe. The means of production and ownership of other assets are concentrated at a global scale in the hands of ever fewer people and anonymous entities as a result of communication technologies and deregulation of markets.⁷⁸ These entities are the main global actors which are able to take advantage of globalized knowledge production. Concentration and exclusion may best be demonstrated by the patenting of the results of knowledge production. These patent rights exclude all but the few holders from their use and from the use of the natural resources from which these patented products are often derived.

Gradually, the public debate is re-centring on cooperation, human dignity and solidarity to counter this exclusion. In this context the social economy stands for another way of “doing business”. What unites people who categorize themselves as working in or for the social economy is their rejection of a “money only” way of catering for human needs. It translates into their unwillingness to accept that ever more needs remain unmet, especially in the health and social service sectors where growing dehumanization and bureaucratic procedures are increasingly being resented. In general, producers and users want a greater say in the decision-making processes concerning their lives.⁷⁹

The debate on what constitutes the social economy is ongoing. Various issues need considering.

Firstly, a distinction must be made between the social economy as a political concept relating to a specific activity or an objective (and thus being the object of promotional policies) and the legal form of the actors within that category. Rarely is this distinction made explicit.⁸⁰ The discussion here centres on the legal form of the social economy actors.

⁷⁸ According to Geissler, worldwide 400 families earn more than 3 billion people altogether, i.e. almost half of the world’s population has to live on less than these 400 families own. See Geissler.

⁷⁹ See Kurimoto, Akira, “Cooperative solutions in health and social care: a participatory social enterprise model”. Contribution to the 2011 Global ICA Research Conference on “New Opportunities for Cooperatives” 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings. See also above argument related to cooperatives and social justice as part of the sustainable development discussion.

⁸⁰ Münkner (“Panorama d’une économie sociale qui ne se reconnaît pas comme telle: Le cas de l’Allemagne”) writes, “Selon les idées des militants de l’économie sociale les entreprises de l’économie sociale ne sont pas définies par leur forme juridique, mais plutôt par leur philosophie, leur système de valeurs et leur manière de gérer une entreprise”.

Social economy enterprises work in a variety of fields and take on various forms.⁸¹ In general the description of the social economy contains at least two aspects. On the one hand, it contains an account of the activities and objectives: health care, care for the elderly and disabled, education, job creation, integration of persons with disabilities into the labour market, reintegration of former drug users and delinquents. The common element of these activities is that they satisfy needs which are difficult to satisfy privately and which are less and less catered for by public institutions. On the other hand, the description of the social economy contains an account of the entities through which these objectives and activities are pursued.

The relevance of this distinction is difficult to convey as activities are visible; the form of an actor is not. The legal structure remains hidden at least as long as there are no conflicts among the stakeholders. The lack of distinction of these aspects easily leads to misusing a type of enterprise in order to access preferential treatment.

Secondly, the functional relationship between the legal structure and the activity is either underestimated or overestimated, leading possibly to dysfunctionalities. The extreme example is the current phenomenon whereby private enterprises, including cooperatives, are more and more expected, at times even required, to attend to public interests, whereas public entities are required to behave like private companies.

Thirdly, in general the debate on social enterprises focuses on the distribution of the produced wealth with its two aspects: remuneration of the investor and/or distribution to other beneficiaries according to social criteria. It tends to relegate to a secondary stage the objective of an enterprise – economic and/or social, the way the wealth is produced and the nature of the relationship between the enterprise and those who control it – investment relationship and/or transaction/member/user

⁸¹ For example, foundations run hospitals in the United States of America, whereas in Austria, France and Germany many hospitals are organized in the form of associations. Associations also play a dominant role in providing social care for the elderly and rehabilitating people, both as in-house service providers and as mobile service providers. Sweden is famous for its daycare and kindergarten facilities in the form of parent-run cooperatives. In Canada, cooperative nursery schools and daycare centres constitute the second largest group of cooperatives in the country. In the United States of America health care through cooperatives is an expanding sector. In Japan, health and social care cooperatives are rapidly growing in number, not only in under-serviced rural areas, but also in urban agglomerations. Utility services are provided by cooperatives in Argentina, Brazil, Finland and the United States. In Finland (see Kostilainen, Harri and Pekka Pättiniemi, “State of Social Economy and Social Enterprise Concept in Finland”. Contribution to the 2011 Global ICA Research Conference on “New Opportunities for Cooperatives” 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings), France, Italy and Spain, unemployed people form cooperatives with state support in order to ensure their reintegration into the labour market or, more and more, to turn the cooperative into a self-sustained workplace. Both objectives serve the aim of reintegrating the beneficiaries socially. In Spain, self-employed people get together in order to jointly seek minimum work and social protection (see especially Arranz, de la Cruz). In Poland, Spain and in the United Kingdom, cooperatives care for the mentally handicapped. In Italy, social cooperatives aim at integrating the mentally handicapped, drug abusers, delinquents and the unemployed into the regular labour market.

relationship, as well as the question of whether the end beneficiary is the public at large or a defined group, for example members of the cooperative.⁸²

Fourthly, the debate does not sufficiently uncover its purpose. Like any categorization, the attempt to categorize social economy actors serves a purpose. The purpose is the promotion of these actors for political reasons. Except for rare cases, this promotion does not require changes to the existing legal typification of actors. In most countries, the actors in the social economy are cooperatives, associations, foundations and mutual societies. Cooperatives constitute the bulk of them. Generally, separate laws apply to each of them.⁸³ The legal structure of social economy actors is being reconsidered in order to assess their functionality related to the requirements of the social economy and in order to suggest adaptations where necessary and possible.⁸⁴

Contrary to a widespread assumption, the field of activity may not be used as a definitional criterion for the legal form social economy enterprises may take. It is obvious, for example, that the production or provision of a service which satisfies a social need, like the treatment of a disease, care for the elderly or education, does not make the service producer or provider a social enterprise per se. A stock company may well provide health care although, by legal definition, its primary objective is that of maximizing the return on the investment. The same is true for public and utility services.

The debate on the legal form of social economy organizations must rather be based upon structural aspects. According to the European Union Charter of the Social Economy and the literature on the subject, for example, social economy enterprises are autonomous private law entities and they share the following structural/operational features:

- [...] primacy of the individual and the social objective over capital
- Voluntary and open membership
- Democratic control by the membership [by definition not applicable in foundations]
- [...] combination of the interests of members/users and/or the general interest
- [...] defence and application of the principle of solidarity and responsibility
- Autonomous management and independence from public authorities

⁸² For these distinctions see below Part 2, Section 2.2, Distinction between cooperatives and stock companies.

⁸³ See *Cid*.

⁸⁴ See above Part 2, Section 1. General. This is another concern of the Study Group on European Cooperative Law, SGECOL (for the other one see footnote 45 above). Information at: <http://www.euricse.eu/en/node/1960> .

- [...] essential surplus is used to carry out sustainable development objectives, services of interest to members or of general interest.⁸⁵

These are the common features of social economy enterprises, but there are also differences among the main types of social economy actors, namely foundations, cooperatives, associations and mutual societies. The following aims to outline these differences.

2.1.1 “For profit” or “not for profit”

As soon as an entity is to be, or at least is to become, economically self-supporting and as soon as it engages in economic activities or even has an enterprise, it must produce a positive result. This does not mean that the purpose, that is the sole aim of that activity and/or enterprise, must be to produce a profit in the narrow sense of a “capitalist profit”.⁸⁶ The question is therefore not “(for) profit” or “not (for) profit”. The question is rather about the purpose of profit seeking. Is profit seeking the main purpose of the activity or is profit seeking a means to pursue the betterment of the situation of the beneficiaries of the entity or a means to attain even broader social ends?⁸⁷ But even this distinction is imprecise as it deals with intentions/purposes rather than with tangible, auditable criteria.

2.1.2 Mode of profit distribution

The distinction between the types of social economy actors analyzed here and stock companies lies in the relevance of the investors/capital contributors for the distribution of profits.

Stock companies distribute profits to stockholders in proportion to the money invested. Foundations, associations and mutual societies may not distribute profits. Instead, they must use the profit for the improvement of their products/services. Cooperatives should distinguish between the component parts of the positive result, i.e. profit (derived from transactions with non-members) and surplus (derived according to cooperative principles from transactions with members). According to the strict cooperative principles, profit will be transferred to an indivisible reserve fund; surplus should be distributed among the members, at least in part, in proportion to their transactions with the cooperative over a specified period of time.⁸⁸

⁸⁵ See http://www.socialeconomy.eu.org/IMG/pdf/2007_08_20_EN_charte-2.pdf

Cid, Jeantet, Münkner (“Panorama d’une économie sociale qui ne se reconnaît pas comme telle: Le cas de l’Allemagne”) and Vienney use roughly the same criteria. Cid, referring to the differences in politico-economic theory, adds to these criteria the following interesting aspect: whereas in capitalist, as well as in communist economic theory, capital hires labour, in the social economy the opposite is true (see Cid).

⁸⁶ As Münkner rightly observes, in his “Panorama d’une économie sociale qui ne se reconnaît pas comme telle: Le cas de l’Allemagne”.

⁸⁷ See Cid.

⁸⁸ Münkner (“Panorama d’une économie sociale qui ne se reconnaît pas comme telle: Le cas de l’Allemagne”) writes “Si ce ne sont pas les détenteurs du capital, mais ceux qui ont payé le prix ou fourni l’effort qui décident de l’utilisation des bénéfices réalisés, il ne s’agit pas d’un profit capitaliste.”

2.1.3 Ownership of assets

Another difference between the types analyzed here lies in the ownership of the assets. Members of associations are not allowed to have jointly owned assets. By definition, foundations and mutual societies have no jointly owned assets. As for cooperatives, they are defined as a “[...] *jointly owned and democratically controlled enterprise*.”

2.1.4 Capitalization

As with profit distribution, the cooperative model seems to be the most flexible with respect to capitalization. A growing number of cooperative laws allows for unlimited non-member business and even for limited member and non-member investments.⁸⁹

“Investments” in foundations do not constitute an investment, but rather a loss for the investor in the form of an additional contribution to the capital of the foundation. Furthermore, they require a cumbersome legal procedure. Some legislations allow for partnership shares in associations.⁹⁰

Mutual societies do not know about investments.

2.1.5 Examples of social economy actors

Among the best-known forms of enterprise in the social economy are the Italian social cooperatives, to be described as multi-stakeholder cooperatives. They provide health care, education or social services or integrate disadvantaged people into the labour market. They are characterized by heterogeneous membership/participation, bringing together producers, users, public entities, mainly local government, whereby not all of them have to be necessarily a member of the cooperative. They cover their financing needs partly through transfer from public budgets, from unemployment schemes and/or from social security schemes. In addition, they enjoy special tax treatment and special treatment in public procurement. A special law on social cooperatives provides for their legal basis.⁹¹

The example demonstrates also that the common interest of the cooperative members does not necessarily have to relate to the service or product produced and/or provided in order for the organization to qualify as a cooperative. The common member interest may relate, instead, to the way a good or service is produced and/or provided. The same is true for workers cooperatives.

The “Italian solution” has the advantage of avoiding many of the negative aspects of an alternative sector whose actors are tempted to indulge in law-shopping by choosing whichever type of organization allows them to escape from the stringent

⁸⁹ For example in Canada, Finland, France, Italy and Sweden.

⁹⁰ For example French legislation.

⁹¹ The 1991 Law on social cooperatives (Law No. 381).

rules of labour and social security law, as well as bookkeeping and accounting standards. The participation of (local) government in these Italian cooperatives ensures at least minimum public control.

Other empirical examples are the Spanish consumer cooperatives and the work integration cooperatives in which member employees have a special status and representation on the governing bodies of the cooperative.

The consultations and debates which led to the adoption of ILO R. 193 in 2002 dealt with the question of whether cooperatives are part of a social economy sector, a special type of social enterprise or a *sui generis* type of business organization altogether. The wording of ILO R. 193 might not be overly clear,⁹² but there cannot be any doubt as to the fact that this instrument, in line with the two other main international instruments on cooperatives, the ICA Statement and the UN Guidelines, does not allow for cooperatives to be considered as an indistinguishable element of a type called “social economy enterprise”.⁹³

2.2 Distinction between cooperatives and stock companies⁹⁴

Cooperatives and stock companies may be compared in terms of their capital structure, management and control.⁹⁵

- Stock companies are investment capital-centred, investor-driven, determined by investment relationships. They must have a minimum fixed capital. Cooperatives are people-centred, member-user driven, determined by transaction relationships. The capital constituted by members’ shares varies with the number of members. The rationale is to avoid a conflict between investor interests and member interests and to allow for the associative character of the member/cooperative relationship to take precedence over possible additional contractual relationships. This does not imply limiting the financing of cooperatives to members’ shares.
- Besides the fact that the nature of the relationship between the investor and the stock company, on the one hand, and between the member and the cooperative, on the other hand, differs, the very content of these relationships also differs. Where an investor may also be the user of the services provided by a stock company or be the buyer/seller of its products, this position is

⁹² See Preamble; Paragraph 4.(h): “[...] distinctive sector of the economy, which includes cooperatives [...]”; Paragraph 6.: “[...] cooperative, mutual and the other social and non-governmental sector [...]”; Paragraphs 6.(c) and 7.(2): (“[...] other forms of enterprise and social organization”).

⁹³ See, for example, ILO R. 193 Paragraphs 4(h), 5., 8(2)(b).

⁹⁴ For the use of the word “stock company” see footnote 30. See also discussion under Part 2, Section 1. General, concerning new types of cooperatives. To these new types the following applies with modifications only. The arguments repeat partly what is said under Part 1, Section 3, The viability of cooperatives in a global economy and legal policy issues (Sustainable development).

⁹⁵ This is a preliminary comparison. To the author’s knowledge, little has been published on the subject in recent years. But see for example Münkner (ed.), “Nutzer-orientierte” versus “Investor-orientierte”.

rather accidental. In cooperatives this position is, in principle, a structural element. Members are the main users of the services of their cooperative or are the majority of the workforce in a workers' cooperative.

- Members' shares in cooperatives are membership shares. Languages, other than English, distinguish between the shares of stock companies and cooperative membership shares by using different words. For example, in French *actions* and *parts sociales*. They do not represent a share in the assets, nor do they constitute an investment.
- Stock companies are expected, and at times they are under the legal obligation, to produce the highest possible return on the investments. Therefore they seek market opportunities; they are interested in the exchange value of (their) products. Cooperatives seek to service their members; they are interested in the use value of (their) products. While cooperatives, as enterprises, need also to produce positive results, they are not-for-profit enterprises ("not-for-profit" to be distinguished from "non-profit" - see above); i.e. they do not seek this positive result per se, but seek a positive result in order to pursue their objective which is to satisfy their members' economic, social and cultural needs. The positive result must serve this end.⁹⁶ Hence, the objects/finalities of these two enterprise types differ.
- The positive result of cooperatives splits, as said, into two distinct parts: profit on transactions with non-members, if any, generated according to commercial terms; and surplus on transactions with members, generated according to cooperative terms. A number of Latin American legislations, as well as the 2008 Ley marco para las cooperativas de América Latina (Section 7), qualify the transactions between members and their cooperative as *acto cooperativo*⁹⁷ or cooperative acts as opposed to commercial acts.
- The difference between "profit" and "surplus" not only relates to the way they are generated, but also, as said, to the way they are distributed. Stock companies distribute profit to the shareholders in proportion to their investment. Cooperatives do not distribute profit and at least part of their surplus is to be distributed to the members and this in proportion to the transactions the individual members had with the cooperative during a specified period of time (see third cooperative principle: Member Economic Participation).
- Management of stock companies centres on that of the capital investments and their growth. In cooperatives, management centres on members. Capital must serve not only current, but also future members' needs and has therefore to be preserved over time. That is another reason why the main part of capital, the reserve fund, should be locked-in (indivisible) capital and not be distributed.

⁹⁶ See above discussion, Part 2, Section 2.1, Cooperatives and social economy enterprises.

⁹⁷ See Pastorino.

- Control in the two types of enterprises differs as well. In stock companies voting rights are allocated in proportion to the invested capital. As associations, cooperatives allocate equal voting rights to members, independently of their economic position, i.e. cooperatives are controlled democratically.

In addition to these differences in capital structure, management and control, cooperatives and stock companies also differ on more general features. They differ in the way that:

- they relate to labour. Whereas according to capitalist, as well as communist economic theory, capital hires labour, in the social economy including cooperatives the opposite is true.⁹⁸
- cooperatives are about individual needs satisfaction through a group approach, whereas stock companies are about return on investments.
- they grow. Where stock companies grow through expansion and/or mergers, cooperatives grow through expansion and/or by cooperating horizontally or by forming unions and federations, serving the interest of the members at primary level and safeguarding the autonomy of the partners and constituent parties respectively (see ILO R. 193 Paragraph 6.(d)).
- they judge the result of their activity and in the way they define the results achieved. For cooperatives, the way matters more than, or at least as much as, the result of the activity and,
- they relate to concerns for the community and society at large. This is more and more becoming the place where the comparative competitive advantages and disadvantages of enterprise types will be assessed. The distinction will be on the question of whether corporate social, and even societal, responsibility (a term used mainly in the debate on CSR in the francophone world)⁹⁹ remains beneath the level of the law, so to speak, or whether it can be formulated as legally binding obligation¹⁰⁰ and/or be part of social and societal compulsory audit, as is already the case for some types of cooperatives in some countries.¹⁰¹

⁹⁸ See Cid and Part 2, Section 2.1 Cooperatives and social economy enterprises.

⁹⁹ See Javillier.

¹⁰⁰ See Supiot, *L'esprit de Philadelphie. La justice sociale face au marché total*; idem, *Contribution à une analyse juridique de la crise économique de 2008*.

¹⁰¹ For societal audit, see Münkner, "Bilan sociétal - ein neuer Ansatz zur Messung des Erfolgs von Genossenschaften in Frankreich".

3. WHY LEGISLATE ON COOPERATIVES?

3.1 General

In the above-cited introduction to his 1951 article on comparative cooperative law, Barnes not only predicts, somewhat apologetically, the future of cooperatives, but he also summarizes the finality of modern cooperative law as bridging the divide between cooperatives as economic institutions and their legal-organizational structure. Independently of the question of whether¹⁰² or not¹⁰³ it is possible to define law, it is possible to describe it as “a constantly renewed way of imagining reality, [the] intermediary between the world of tangible facts and the world of ideas”.¹⁰⁴

Even though many are of the opinion that rather than regulating institutions, it would be important to regulate functions and activities¹⁰⁵, the very nature of these *Guidelines* emphasizes law as a structuring element of cooperatives; i.e. it emphasizes the normative aspect of an entity whose associative and enterprise activities create an institutional reality. Besides, functions/activities versus institutions is a false alternative. ILO R. 193, especially its Paragraph 7(2), is clear on this. It separates activities from form, i.e. activity from actor. But it holds the two issues as equally important¹⁰⁶ and in need of regulating. Furthermore, the *raison d'être* of different enterprise types is the variety of functions and activities to which the enterprise type is not neutral.

In certain countries, such as Denmark and Ireland, cooperative organizations prosper without being ruled by their own law. However, there are no cooperative organizations prospering without any legal rules applicable to them. Some of the main reasons for this are:

- The existence of a cooperative law is a necessary, though not a sufficient, condition for getting a cooperative policy to work. In the legal acceptance of the word, institutions may be built in two ways: through a number of legal rules, which are made to concur in such a way that they materialize a certain idea and/or by creating a legal/ juridical person on the basis of an idea. This type of formalization improves the efficiency of economic entities, since, besides natural persons, only juridical/legal persons may have rights

¹⁰² See Hart, p.1. See also Assier-Andrieu, p.40; Proceedings of the 2007 Conference of the Association Internationale de la Philosophie du Droit (IVR).

¹⁰³ Tamanaha, p.313

¹⁰⁴ Assier-Andrieu, p.38 (referring to Gurvitch): “[Le droit est] une façon sans cesse renouvelée d’imaginer le réel. ‘[L’]intermédiaire entre le monde des faits sensibles et le monde idéal.” English translation by author.

¹⁰⁵ See discussion by Cuevas and Fischer.

¹⁰⁶ See ILO R. 193, Paragraph 7(2) and discussion below of the contents of ILO R. 193, Part 2, Section 4.1.3.2, The contents of ILO R. 193 as far as it concerns cooperative law.

and obligations. Rarely is this made explicit.¹⁰⁷ Through the conferral of legal person status upon an entity liability shifts from natural persons to that entity. This is, as said, an incentive to economic activity, the benefits of which cannot be overestimated. It requires, however, strict lines of responsibility, liability and control in order not to jeopardize the very advantage of obtaining legal person status. Moreover, juridical/legal persons may not only participate as business partners in transactions on the market, but they may also make use of the possibility of becoming members of specific enterprise associations, like shared services cooperatives or entrepreneurs' cooperatives.¹⁰⁸ In this case they contribute to and make use of the positive effects of the tax and labour law system, and of social security schemes and other public policies.¹⁰⁹ In complex societies, where social control can no longer be based on close personal relationships, juridization of relationships has proven to be the most adequate means of regulating the activities of economic agents. By definition, this is especially true where economic relations are not entertained by physical persons only, but also by legal persons. In order to provide for legal security, the law has to establish the criteria for the definition of these persons, the power of their organs/bodies and their liability in lieu of that of the members or the individual shareholders. ILO R. 193 promotes the idea of institutionalizing cooperatives in the sense of conferring legal personality.¹¹⁰

- Among today's general public policies, the establishment of the rule of law stands out. The rule of law is a fundamental element in the new approach to development, which emphasizes respect for human rights. This presupposes that the relationship between citizens and the state is founded on acts of parliament.
- National laws are a necessary means to implement public international cooperative law, of which ILO R. 193 forms the nucleus.¹¹¹
- In international cooperation and among global economic agents law is used in an ever-increasing manner as a means of information and communication. Law is a reference point and a guideline.

¹⁰⁷ See above in the context of economic security as an aspect of sustainable development, Part 1, Section 3, The viability of cooperatives in a global economy and legal policy issues (Sustainable development).

¹⁰⁸ See Göler von Ravensburg.

¹⁰⁹ Assier-Andrieu, pp.39 ff.; Barnes, p.574; Kemmerer, referring to Eberhard Schmidt-Aßmann; Wassermann, p.258.

¹¹⁰ See ILO R. 193, Paragraphs 2. ("association", "jointly owned"), 5. and 6. (b) ("solidarity"), 6. (a) ("registration"), 6. (b) ("reserves"), 6. (d) ("membership", "members"), 7. (2), 4. (d), 8. (1)(i) and 11. (2)(c) ("access to credit", "loans", "institutional finance", "investment"), 8. (2) (b) ("legal obligations of cooperatives"), 10. (2), 11. (3), (4), 14., 17. (c), (e) ("cooperative organizations", "affiliated cooperatives"), 12. (c) (banking and insurance cooperatives") and, foremost, Paragraph 9. concerning the transformation of informal economy actors into formal actors. Also a number of legislations prohibit the use of the denomination "cooperative" by any entity which is not registered and recognized as such by law.

¹¹¹ See Part 2, Section 4.1.3, Public international cooperative law: ILO R. 193.

- Law bridges the gap between the complexity of social life and the definition and attribution of various roles in society, on the one hand, and the knowledge, or rather the lack thereof about technology and social issues required in order to understand these complexities, on the other.
- Law is a suitable and tested means to represent and maintain a just balance between the autonomy of the cooperators and the cooperatives, on the one hand, and the powers of the state, on the other.

Law is a means to transform informality into formality.

Further discussion will follow, albeit indirectly only in some cases. Because of its importance, not least for the ILO, informality and cooperative law will be dealt with separately and at some length in the following section.

3.2 Informality and cooperative law

The number of informal economy actors is growing in almost all countries. Major activities in the informal economy include tourism, vending, services, trade, agriculture, manufacturing, transport, cottage industries, money lending and construction. Cooperatives are present in all these sectors.

Numerous ILO documents link cooperatives to the transition of actors in the informal economy to formality and they link each of these phenomena to law.¹¹²

The focus here is on the normative aspect of *law*.¹¹³ This is to avoid a premature inference from the empirical evidence of the non-application of laws to the inadequateness of law as such to benefit the informal economy actors.¹¹⁴

The greatest benefits from the formation of cooperatives by informal economy actors are to be expected from the effects of pooling their resources. However small these resources are, pooling increases negotiating power and it helps transfer knowledge and know-how. The structural characteristics of cooperatives lend themselves well to this pooling. Furthermore, cooperatives are an easily accessible enterprise type in relative terms as capital requirements are minimal and as an

¹¹² ILO R. 193, Paragraph 9 reads: “Governments should promote the important role of cooperatives in transforming what are often marginal survival activities (sometimes referred to as the “informal economy”) into legally protected work, fully integrated into mainstream economic life.” See also: ILO Report on “Decent work and informal economy”. It states (p.92): “Where there are major constraints to informal economy operators or workers joining existing employers’ organizations or trade unions or establishing their own organizations, the most effective membership-based organizational structure may be that of a cooperative.” [...] and: “Organizing in cooperatives could also be seen as one step on the path towards formalization.” See also Resolution and Conclusions concerning decent work and the informal economy, International Labour Conference 2002, Paragraph 26.

¹¹³ Distinction to be made between *laws* and *law*, *loi* and *droit*, *Gesetz* and *Recht*, *ley* and *derecho*, *legge* and *diritto* etc.

¹¹⁴ A critical remark by the Governing Body (GB) of the ILO, see GB298-ESP-4-2007-02-0118-1-En.doc, Para.45 might be interpreted to this effect.

Box 8: Informal Economy

According to the definition by the International Labour Conference 2002, “(t)he term “informal economy” refers to all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs” (See Resolution and Conclusions ..., Paragraph 3).

To be seen as informal activities are “(a)ll activities falling de facto or de jure out of the reach of law” (ILO Governing Body (GB), see GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 14).

The Governing Body of the International Labour Organization (GB) stated in its March 2007 session that “(t)he very characterization of the informal economy in the 2002 International Labour Conference discussion is cast in terms of the relationship to law...”. At the same time, the GB expressed some doubts as to the effectiveness of the emphasis on the “regulatory framework”. See GB298-ESP-4-2007-02-0118-1-En.doc, Paragraph 14 and Paragraph 45 respectively.

initial lack of skills can be overcome by information, training and education programmes offered in most countries by governments, cooperative movements, donors and NGOs. However, “easily accessible” must not be construed as “simple organizational and operational form of enterprise”.

For the past 160 years, cooperatives have proven to be a means for informal economy actors to join the formal economy in many countries around the world. Cooperative policy and law facilitate the recognition of cooperatives as legal persons with the same rights and obligations as other legally recognized business entities. An adequate cooperative legislation, including taxation of cooperatives, which takes into account the difference between profit and surplus, the rationale of patronage refund payments to members and the setting up of indivisible reserve funds, as well as the application of cooperative-specific accounting standards, are all measures which go a long way towards deterring informal economy actors from tax evasion and from avoiding paying contributions to social security schemes.¹¹⁵

Formalization through the formation of cooperative enterprises, recognized as legal entities, raises a number of conceptual questions. Firstly, formalization must not be an aim in itself. In all societies, informal activities and arrangements are indispensable for social and economic well-being. Secondly, despite its universal

¹¹⁵ These Guidelines suggest such a systemic approach. See also ILO, “The informal economy: enabling transition to formalization”, Paragraph 45.

acceptability, the notion of cooperatives as legal entities presupposes conceptualizations,¹¹⁶ which are not universal. In many societies, especially those with a high prevalence of informal economy actors, the cultural postulates for the recognition of juridical/legal persons are not given.¹¹⁷ When distinguishing between organized and non-organized self-help groups, it is important to differentiate between cooperatives as voluntary associations of persons, i.e. a mode of organizing a group, and communities, or a way of life.¹¹⁸ Cooperatives may only prosper if their members are autonomous in their economic activities and if economic life in general is kept separate from other social activities. Societies where the community is considered as an indivisible entity find it difficult to integrate the concept of legal personality, which allows for abstract bodies to exist independently of their members. They find it, for example, difficult to understand that the financial liability of cooperators may be limited to their shares. Where the concepts of association and community are confused, it may happen that the implementation of the cooperative law will be hampered by community-type mechanisms. This mixture tends to be harmful to both the cooperative and the community-type group in which cooperative members often continue living. The distinction between associations and communities must not be confused with that between cooperatives and simplified cooperative structures, as proposed further on in these *Guidelines*. Thirdly, the notion of law needs clarification in order to avoid the above-mentioned premature inference from laws being ineffective, to law being an inadequate means as such. Looking at a number of elements of the definition of informality shows that inefficiencies are a matter of political will and/or failure to implement the law rather than a deficiency of law. This may be demonstrated by looking at the following elements of the commonly found description of the informal economy actors:

1. “the scope of the law does not cover informal actors or their activities”:
remedies only require the political will to change this.
2. “the law is inappropriate, burdensome, or imposes excessive costs”:¹¹⁹ these are value judgements which call for an analysis before remedies can be designed and applied, as these value judgments will most probably be put forward by a large variety of actors, including fraudulent tax evaders.

¹¹⁶ Concepts and conceptions might be thinkable in any culture, but their conceptualizations are likely to be culture bound, i.e. they can be thought everywhere, but they are not thought everywhere the same way. This is what is expressed through the words acceptability and acceptance.

¹¹⁷ See, for example, Henry, “Genossenschaften als juristische Personen – Konsequenzen für die internationale Beratung bei der Genossenschaftsgesetzgebung in Afrika”.

¹¹⁸ See Henry, “Co-operation in Cooperative Legislation – Some Provisional Remarks”; idem, “Genossenschaften als juristische Personen – Konsequenzen für die internationale Beratung bei der Genossenschaftsgesetzgebung in Afrika”. See also Münkner (ed.), *Towards Adjusted Patterns of Cooperatives in Developing Countries*.

¹¹⁹ See Resolution and Conclusions concerning decent work and the informal economy, Paragraph 3.

3. “implementation mechanisms are missing or failing”: for example, where there are no or only inadequate prudential mechanisms, cooperatives are restricted, or even barred, from providing financial services or exercising banking activities. There are no or only inadequate mechanisms to avoid the emergence of bogus cooperatives, which are set up to circumvent tax and labour laws. Where these are correct observations in many circumstances, calling for obvious remedies, it is equally true that in many instances such mechanisms fail because the informal economy actors live outside, or partly outside, the state structures, i.e. they live in another political order and/or under a legal system which is different from that of the state. This might imply situations where the formal and the informal economy can hardly be separated.
4. “informal economy actors often develop strategies to avoid formal constraints, especially contributions to social security schemes and tax payments”: this not only leaves them without social protection, but it also leads to economic distortions between the formal and the informal economy actors. It deprives the latter of economic opportunities as formal economy actors are reluctant, if not outright hostile, to recognizing informal economy actors as business partners. In addition, the unequal distribution of obligations leads to social and, eventually, to political frictions.

Through its Cooperative Branch the Office of the ILO has worked to at least partly compensate for these shortcomings. It has done so for example by:

- helping to provide for versions of the cooperative law in the vernacular languages spoken by the addressees;
- helping to provide for laypersons’ guides to the cooperative law;
- helping to draft cooperative bylaws;
- suggesting more culturally adapted forms of cooperatives. The starting point was the inclusion of common economic initiative groups into the 1982 Law on cooperatives in Cameroon. This has also led the Cooperative Branch to include in its cooperative policy and legislation advice on the subject of simplified cooperative structures (see Part 3, Section 9).

4. WHAT KIND OF COOPERATIVE LAW?

4.1 The wider legal framework

The wider legal framework is set by the following regional and international instruments. They vary as far as their scope and their legal value¹²⁰ are concerned. Some of them apply to a specific sector only. They are interrelated by the fact

¹²⁰ The author uses the term “juridical value” to signify several aspects, namely “legal nature”, “binding force”, “legal effects” and “juridical value”, without always distinguishing them correctly in the text. For these distinctions, see Virally, p.174.

that their respective legal value contributes to arguing that ILO R. 193 constitutes binding public international law. However these different aspects are to be weighted, these instruments limit the autonomy of national legislators.

4.1.1 Regional Cooperative Law

4.1.1.1 OHADA Uniform act on cooperatives

After more than ten years of preparation and negotiations the sixteen member States of OHADA (Organization for the Harmonization in Africa of Business Law) adopted a uniform act on cooperatives in 2010.¹²¹ The Act is directly applicable in the member States of OHADA.

4.1.1.2 European Union Council Regulation on the Statute for a European Cooperative Society (SCE)

In 2003 the European Union (EU) promulgated Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE) after more than thirty years of preparations. The Regulation came into force in 2006. As a regulation, it is directly applicable in the Member States of the EU. Contrary to the OHADA Uniform Act on Cooperatives, it does not regulate national cooperatives, but creates a new type of cooperative, the SCE. Membership must come from at least two EU member States. It does not regulate all legal aspects of cooperatives. In a complicated system of cross-references, it refers to national cooperative laws. This can be seen as having created 27 different types of SCE, instead of introducing just one new type.¹²²

4.1.1.3 Mercosur Common Cooperative Statute

The countries of Mercosur have had since 2009 a Common Cooperative Statute.¹²³ Like the EU Regulation, it is directly applicable in the member States to facilitate the cross border establishment of cooperatives, and it does not regulate national cooperatives. However, its application requires transformation into national law. So far, this has been done by Uruguay only.

¹²¹ Acte uniforme relatif au droit des sociétés coopératives. Available at: <http://www.ohada.org/droit-des-sociétés-coopératives>.

¹²² This is the result of a study carried out by a consortium consisting of the European Research Institute on Cooperative and Social Enterprises (Euricse), the Mondragon Corporation and Mondragon University EZAI Foundation, as well as Cooperatives Europe - the European organization of the ICA. See "Study on the implementation of the Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE), October 5, 2010". It is available at: <http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/social-economy/>, or at: <http://www.euricse.eu/node/257>.

¹²³ Estatuto de las Cooperativas (Mercosur/PM/SO/ANT.NORMA 01/2009).

4.1.2 Other relevant regional texts

4.1.2.1 Ley marco para las cooperativas de América Latina / Framework law for cooperatives in Latin America

The 2008 Ley marco para las cooperativas de América Latina¹²⁴ is a convincing translation of modern cooperative thinking into a “model law”. Emanating from a private entity, ICA Americas, it has no binding force upon legislators. It may be assumed, however, that it will play the same convincing role in lawmaking processes as did its first edition (1988) over the years. Moreover, it is a useful tool as it combines proposals for a text of a cooperative law with a succinct commentary on each article.

4.1.2.2 WOCCU model cooperative law

The World Council of Credit Unions (WOCCU) elaborated a model law on savings and credit cooperatives.¹²⁵ Its legal value and effects are comparable to those of the Ley marco para las cooperativas de América Latina. It translates one of the two major “schools” of thinking on savings and credit cooperatives, the other being the “Raiffeisen” model.

4.1.3 Public international cooperative law: ILO R. 193

4.1.3.1 The legal value of ILO R. 193¹²⁶

The arguments to support the opinion that ILO R. 193 constitutes binding public international cooperative law are the following:

1. Resolutions and recommendations of international organizations may be sources of public international law,¹²⁷ although they are not mentioned among the sources listed in Article 38 § 1 of the Statute of the International Court of Justice. This list is not exhaustive.¹²⁸

¹²⁴ Text available in English, Portuguese and Spanish at: <http://www.aciamericas.coop/IMG/pdf/Ley-MarcoAL.pdf>.

¹²⁵ Text available in English and Spanish at: <http://www.woccu.org/policyadvocacy/legreg>

¹²⁶ The following arguments are an adapted excerpt from Henry, *The Contribution of the International Labour Organization to the Formation of the Public International Cooperative Law*. The arguments put forward are to remove my own doubts as to whether they suffice to say that a public international cooperative law exists or whether one cannot but report on an “emerging” law. In the latter sense cf. Henry, *Guidelines for Cooperative Legislation* (2001). As of 2005 the ILO published the opinion that indeed such a public international law had emerged, see Henry, *Guidelines for Cooperative Legislation*, second revised edition, p.5.

¹²⁷ See Montt Balmaceda, p.138; Politakis et Markov, p.513; Shaw, pp.92 ff.; Verdross und Simma, Nrn. 518-523; Verhoeven, pp.355 ff. and p.447; Virally, pp.169 ff. The wording “may be” indicates that a case by case assessment is required.

¹²⁸ See, for example, Kennedy, pp.18 ff. Another “school” prefers to integrate such other sources into one of the categories of Article 38, § 1. As this would not alter the argumentation, I do not further pursue this point.

2. The fact that the ILC, when debating ILO R. 193, opted for a recommendation, instead of a convention,¹²⁹ may not be interpreted as opting for a legally non-binding labour standard. As for their respective legal value, the difference between ILO conventions and ILO recommendations may not be reduced to the former being legally binding and the latter not. Articles 19 and 30 of the ILO Constitution, as well as Article 7 of the Standing Orders of the International Labour Conference concerning the Committee on the Application of Conventions *and Recommendations*,¹³⁰ do not allow for such an interpretation.
3. The ILO has a constitutional mandate to adopt standards on cooperatives¹³¹ as its mandate is not limited to labour law in the narrow sense. Article 1 of the Constitution stipulates: “A permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution ...”. The first object “set forth in the Preamble ...” is “peace ... based upon social justice”. Labour law is certainly an important means through which social justice must be pursued, but it is not the only one. The ILO and its member States have a margin to decide on the means to employ. The question is therefore whether cooperative law is an adequate means to achieve social justice. The answer to this question may be found in an analysis of the cooperative laws and of their implementation in the various countries. We observe that a growing number of cooperative laws oblige cooperatives expressly to contribute to social justice.¹³² We also observe that in a growing number of states implementation of these texts is improving.
4. ILO R. 193 was adopted with an overwhelming majority; only three delegates abstained.¹³³
5. Recommendations of the ILO carry more legal weight than those of other international organizations as the ILO is a tripartite organization, i.e. it is more representative than other international governmental organizations.¹³⁴

¹²⁹ Conventions and recommendations are the two main instruments of the ILO. See ILO Constitution, Article 19.

¹³⁰ Emphasis by author.

¹³¹ This has been confirmed by the (independent) Experts of the Committee on the Application of Conventions and Recommendations (Art. 7 of the Standing Orders of the International Labour Conference). Their 2010 “General Survey concerning employment instruments in the light of the 2008 ILO Declaration on Social Justice for a Fair Globalization” places ILO R. 193 firmly within the employment instruments of the ILO.

¹³² The definition of cooperatives as enshrined in ILO R. 193, Paragraph 2, requires doing so. Consequently, audit should assess whether this has been complied with. Some (model) legislations require that part of the surplus be set aside for social purposes. See for example Article 42 of the Ley marco para las cooperativas de América Latina (see Part 2, Section 4.1.2.1, Ley marco para las cooperativas de América Latina). For more details, see above concerning the potential contribution of cooperatives to social justice, Part 1, Section 3.2.3, Social justice.

¹³³ See <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/pr-23vote.pdf>

¹³⁴ The constituents are the governments, employers and workers’ organizations of the member States. This is a unique case among the international governmental organizations.

6. Recommendations of the ILO carry special weight as they should at least represent more than the sum total of the interests of the member States and something other than the smallest common denominator of these interests, because the ILO is also a “transnational” organization. The delegates to the ILC have a free mandate.¹³⁵ Lawmaking by the ILO is a unique case of transnational legislation.¹³⁶
7. The ILC integrated, as said, the essential parts of the ICA Statement into ILO R. 193: the definition into Paragraph 2; the cooperative values into Paragraph 3 and the cooperative principles into Paragraph 3 and into the Annex. By doing so, it promoted the status of the ICA Statement from that of a text of an international non-governmental organization to that of a legal text of an international governmental organization while, at the same time, increasing the legal value of ILO R. 193 itself. In a world characterized by globalization, by diminishing democratic participation in lawmaking, by a growing informalization of the economies and by an increased influence of private standard setting on public lawmaking, the integration of the ICA Statement into ILO R. 193 carries special weight when assessing the legal nature of this recommendation. The ICA Statement has to be considered within this context of standard setting by private actors. The ICA has been the guardian of the cooperative values and principles since 1895. It is the largest and probably also the oldest international NGO. This gives it a special legitimacy in our debate. But even more important, the ICA is democratically structured and it represented in 2002 when ILO R. 193 was adopted some 700 million individual members. Today they number close to one billion. The opinion of these cooperative members, as condensed in and expressed through the ICA Statement, must count.
8. The legal nature of ILO R. 193 stems also from it reflecting a repeated behaviour of the ILO member States in international/intergovernmental lawmaking. States are thus demonstrating their will to be bound by such law and are establishing a praxis which will soon qualify – if it has not already – as a source of public international law under Article 38, § 1 of the Statute of the International Court of Justice. Examples of such repetitive behaviour are:
 - In 1966 the ILC had adopted R. 127. This is used as an argument despite the fact that R. 193 “revises and replaces” it (ILO R. 193, Paragraph 19). ILO standards lose their validity through a formalized derogation procedure only. ILO R. 127 has not yet been included in such a procedure. It contains a separate chapter (Chapter III) on cooperative legislation which is to a large extent reflected in the Report of the International Labour

¹³⁵ See ILO Constitution, Article 4, 1.

¹³⁶ See Jessup; Schnorr. Schnorr saw this form of legislation as an evolution of the international society towards a transnational community. In his footnote 10 he refers to Jessup (1947). Similarly Virally, pp.181 ff.

Office to the ILC in preparation for the debate and the adoption of ILO R. 193¹³⁷

- In 2001 the UN Guidelines had been adopted by consensus, i.e. also with the consent of the member States of the ILO.
9. An analogous argument can be used concerning the adoption of regional, international and supranational instruments after ILO R. 193. For example,
- the European Union Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE)
 - the 2009 Mercosur Common Cooperative Statute
 - the 2010 OHADA Uniform act on cooperatives¹³⁸
10. The same is true for the behaviour of states individually:
- Some states passed legislation respecting ILO R. 193;¹³⁹ others are in the process of doing so.
 - Representatives and parliamentarians of most of the Latin American states were closely involved with the process of elaboration of the Ley marco para las cooperativas de América Latina despite this model law emanating from a non-governmental body, ICA Americas.¹⁴⁰ This involvement came for the second time as this model law is a (revised) repeat of the 1988 model law of the same name which had then been elaborated by the defunct OCA, the Organization of Cooperatives of the Americas.
 - Some states have referred in policy instruments to ILO R. 193. See for example the conclusions and recommendations of the ICA Africa Cooperative Ministerial Conferences¹⁴¹ and those of the Ministerial Conferences organized by the ICA Regional Office for Asia and the Pacific (the most recent one on the subject in 2007). In 2011 the Presidents

¹³⁷ International Labour Conference, 89th session 2001, Report V(1), Chapter II, 3

¹³⁸ The texts mentioned under Points 8 and 9 make frequent reference to one another, thus reinforcing ILO R. 193. Some of these texts refer to, some reflect, the universally recognized cooperative values and principles. The UN Guidelines and the EU Regulation refer to the ICA Statement; the preparatory report for the EU Regulation refers to ILO R. 193 (see Communication 23/2/2004 from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe). As mentioned, ILO R. 193 integrates the substance of the ICA Statement; the Ley marco para las cooperativas de América Latina refers to the ICA Statement, to the UN Guidelines and to ILO R. 193.

¹³⁹ Examples are Cambodia, Kyrgyzstan, Mozambique, Norway, Tanzania, Turkey, Uganda, and Uruguay.

¹⁴⁰ See Alianza Cooperativa Internacional (Ley marco), Presentation.

¹⁴¹ For example out of the 16 Recommendations which the ninth ICA Africa Cooperative Ministerial Conference adopted in 2009, two (No. 1 and No. 2) relate directly to the subject of “Cooperative Development Policy and Legislation”. Recommendation No.2 reads: “It is recommended that ILO Recommendation 193 continues to inform the basis for the [...] legislation review process in the region.”

and Ministers of Labour of the Mercosur countries gave recognition to ILO R. 193 as an instrument to promote cooperatives.¹⁴²

- In preparation for the 2010 ILO General Survey concerning [the implementation of] employment instruments in the light of the 2008 ILO “Declaration on Social Justice for a Fair Globalization”,¹⁴³ a great number of ILO member States answered a questionnaire which also concerned ILO R. 193. None of the states that responded denied the obligation to implement ILO R. 193 in the sense discussed here.¹⁴⁴

11. A number of the highest courts have referred to ILO R. 193 or at least to the cooperative principles enshrined therein.¹⁴⁵

One might add that ILO R. 193 merely concretizes legally binding international and regional Human Rights instruments,¹⁴⁶ which contain all the basic legal guarantees for freely setting up and operating a cooperative. This does not, however, constitute the legal value of ILO R. 193.

4.1.3.2 The contents of ILO R. 193 as far as it concerns cooperative law

As far as cooperative law is concerned, the following contents of ILO R. 193 are relevant:

1. ILO R. 193 is addressed to the governments, employers’, workers’, as well as cooperative organizations of all member States of the ILO jointly and severally. The ILC thus emphasized that not only governments are responsible

¹⁴² See the December 2011 Conferencia Intergubernamental, “Hacia la internalización de la Recomendación 193 OIT Promoción de las Cooperativas”, Cumbre de Presidentes y Declaración de los Ministros de Trabajo de los Estados partes del Mercosur, respectively.

¹⁴³ See Argument 3.

¹⁴⁴ I did not verify the number of answers, nor their contents in detail, when preparing these Guidelines. At the time of the preparation of the General Survey I was responsible at the ILO for scrutinizing and assessing the answers given by ILO member States.

¹⁴⁵ In 2009, and for the first time, a supreme court (Corte Suprema de Justicia de Argentina) referred to ILO R. 193 in its decision. See Corte Suprema de Justicia de Argentina in the case *Lago Castro, Andrés Manuel c/ Cooperativa Nueva Salvia Limitada y otros* and the comment on the decisión by Prof. Dante Cracogna. Both texts, in: *La Ley* (t.2010–A) pp.290 ff. In 2011 the European Court of Justice (EJC) based its decision in the cases C-78/08 to C-80/08 on the SCE Regulation and on the 2004 EU Commission Communication on the promotion of cooperative societies to specify what it sees as the characteristics of cooperatives. The Communication refers to ILO R. 193. See for a discussion of the ECJ decision *Marí, María Pilar Alguacil*, “Taxation of cooperatives: the policies of the European Union.” Contribution to the 2011 Global ICA Research Conference on “New Opportunities for Cooperatives” 24-27 August, 2011 in Mikkeli, Finland, to be published in the Conference Proceedings). Reportedly, the High Court of Kerala (India), as well as the Supreme Court of India (2/9//2011) ruled in 2011 in this sense as well. This could not be verified.

¹⁴⁶ See especially the International Covenant on Civil and Political Rights, doc.999 UNTS 171 (1966) and the International Covenant on Economic, Social and Cultural Rights, Doc. 993 UNTS 3 (1966). See also Henry, “Cooperative Law and Human Rights”, in *The relationship between the state and cooperatives in cooperative legislation*; idem, *Wartosci I zasady spoldzielcze w legislacjach spoldzielczych. Panstw Czlonkowskich Unii Europejskiej dotyczacym Statutu Spoldzielni Europejskiej*; and Ost, p.33.

for the promotion of cooperatives and also that problems need addressing globally and collectively.

2. ILO R. 193 calls on legislators to allow cooperatives to be active in all sectors. There is no reference to the size of cooperatives or to the social strata of the members.
3. The paragraphs concerning cooperative law may be divided into those which oblige legislators to institutionalize cooperatives, those which oblige legislators to pass legislation that (re-) establishes the cooperative identity and those which deal with the contents of a cooperative law.

As for the institutionalization of cooperatives, ILO R. 193 suggests that cooperatives be formalized and it carries, as said, a notion of cooperative which is that of a cooperative having legal personality. The advantages of formalizing cooperatives in this sense have been outlined above.

Several paragraphs (3.; 6.; 7.(2); 10. (1) *et passim*) establish the obligation of legislators to (re) establish the cooperative identity through law, but they do not specify what this identity consists of.

The third set of paragraphs does this to a certain extent. These paragraphs consist of legal rules, legal principles and general recommendations. The following examples are given:

- An example of a legal rule is Paragraph 2, which contains the already cited definition of cooperatives as “autonomous association[s] of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.” The three objectives of cooperatives contained in this definition - economic, social and cultural - are complementary and of equal legal weight. Legislators find it at times difficult to strike an appropriate balance between these three objectives and to ensure that the attainment of all of them be audited as required by Paragraph 8. (2)(b). They also find it at times difficult to strike an appropriate balance between these three objectives, on the one hand, and the two elements which make for the nature of cooperatives, namely “associations of persons” and “enterprises”, on the other hand. Often legislators put unequal weight on these elements. Too much weight put on the association element prevents cooperatives from becoming competitive market participants. Too much weight put on the enterprise element, assuming that the stock company is the only type of enterprise, dilutes the characteristics of cooperatives. The first element identifies cooperatives as a specific type of group entrepreneur. The general tendency to reduce ever more the minimum number of members is raising concerns. A one-member cooperative would be a contradiction in itself. Another aspect of this element is the nature of the relationship between the members and the cooperative. ILO R. 193 implies it to be an associative relationship. Many jurisdictions

conceive it, however, as a contractual one.¹⁴⁷ As for the second element, ILO R. 193 underlines the enterprise character of cooperatives numerous times (see Paragraphs 5.; 6. (c) and (d); 7. (2), 8. (1)(b); 16. (d)).

- Paragraph 7. (2) exemplifies a legal principle, that of equal treatment.¹⁴⁸ It is one of the central paragraphs of ILO R. 193. It reads “Cooperatives should be treated [...] on terms no less favourable than those accorded to other forms of enterprise [...]. Governments should introduce support measures [...] for the activities of cooperatives that meet specific social and public policy outcomes, such as [...].”

The wording of the first sentence is somewhat misleading, as it seems to suggest that cooperatives might receive a more favourable treatment than other forms of enterprise. ILO R. 127 contained the same wording. Despite the fact that this wording was maintained after having received much criticism over the years, one cannot assume that the ILC agreed to a preferential treatment of cooperatives. Indeed the emphasis on the enterprise character of cooperatives, even in Paragraph 7. (2) itself, speaks to the contrary. The matter is also linked to the one of positive discrimination of cooperatives by the state. It is now commonly accepted that negative discrimination of cooperatives violates basic rights and rules on fair competition and thus distorts market conditions. More and more, it is also held that positive discrimination, i.e. the granting of privileges and advantages, prevents cooperatives from becoming competitive. Competitors are not willing to enter into business relations with entities which are known to be fed by the state. Regional and universal economic organizations, like the European Union and the World Trade Organization, increasingly insist on states abiding by international competition law. In addition, positive discrimination requires monitoring. The borderline between monitoring and infringing upon the autonomy of cooperatives is at times difficult to draw. Positive discrimination bears furthermore the risk of false cooperatives being created.

Obviously, the equal treatment principle presupposes the existence of an enterprise type – cooperative – which can be distinguished from other types. It therefore reinforces the obligation to restore and maintain the cooperative identity. The second sentence of Paragraph 7.(2), which differentiates between form and activity, further underlines this. The practical relevance of the equal treatment principle shows as much for the application of the cooperative law itself as it does for the application of those

¹⁴⁷ Rather contractual in the Anglo-Saxon legal tradition, associative in the continental Europe one and *sui generis* in the German-Nordic tradition, Central and South America.

¹⁴⁸ In the legal sense. Paragraph 6 (c) does so for a specific case, while Paragraph 7 (2) contains the general principle.

other rules which, together with the cooperative law proper, form what I call the cooperative law in the wider sense (see Box 2).

- Paragraph 6 (d) is an example of a general recommendation. It directs governments to “facilitate the membership of cooperatives in cooperative structures responding to the needs of cooperative members ...”. Unionizing and federating of primary and of secondary cooperatives in the interest of the cooperative members at primary level is a genuinely cooperative way to reach economies of scope and scale, have representation and establish genuine cooperative value chains which link the producer to the consumer, while maintaining another core principle, which is the autonomy of the affiliates of such unions and federations.¹⁴⁹ Some of these effects can also be achieved by integrating in a horizontal way, respecting the same principles. Cooperation in these forms is preferred over concentration. Despite success in many countries, vertical and horizontal integration are not a widely applied means to develop cooperatives. The risk is that without it primary cooperatives are left with bottom-of-the-ladder, simple production and commercialization. The reasons for this shortcoming are in part political, but also legal as the approach is influenced by different legal traditions defining the member-cooperative relationship, mentioned above.

Another example of a general recommendation is Paragraph 8. (2)(b) concerning the cooperative audit. Effective and efficient cooperative specific audit systems are widely lacking. This is often the result of failing implementation procedures/mechanisms, even where adequate legal rules do exist. Furthermore, the conception of audit enshrined in ILO R. 193 is not yet commonly shared. This audit is to be seen as part of an efficient self-control mechanism and as a tool which enables cooperative members to effectively exercise their control rights, and hence as a means to reduce undue external public control. The same goes for the conception of external official control to which, according to ILO R. 193, Paragraph 6.(c), the equal treatment principle should apply. It is to be exercised with a view to promoting cooperatives, rather than in preparation for negative sanctions.

Concerning other matters, the legislator must seek guidance from the cooperative values and principles referred to in Paragraph 3 of ILO R. 193 and contained in its Annex. These values and principles, however, need juridicizing in order to qualify as legal principles of the kind of the principle of equal treatment.¹⁵⁰ This would allow for a more effective translation into legal rules.

¹⁴⁹ The slogan of a cocoa producing and processing cooperative in Bolivia, El Ceibo, is representative and it is worth mentioning in this context. It reads: “From the trees to the chocolate, we do not collaborate with the producers, we are the producers”. This is almost a word for word repeat of a clause of a consumer cooperative in Zürich established in 1852. See Schiedt, p.106.

¹⁵⁰ For the distinction between legal rules and legal principles, see Alexy; Chuliá, pp.36 ff. Concerning the respective work of SGEVOL, see footnote 45.

4.2 Cooperative values and principles

The UN, the ILO and the ICA, i.e. those universal organizations which have an explicit mandate to further the development of cooperatives of all types, do so on the basis of the cooperative values and principles as enshrined in the ICA Statement and as integrated into the binding ILO R. 193. The following is an annotated list of the main points:

- voluntary, open membership within the limits of the social objective defined in the bylaws/statutes of the cooperative in question, and the right to freely withdraw. The interpretation of this 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 cooperatives. The free will of the members to work together constitutes one of the keys of their motivation and hence the success of the cooperative. This is incompatible with any attempt to impose certain persons as members
- self-help, self-determination, self-administration, self-control and self-responsibility through democratic means (“one member/one vote”). This principle embraces the one of cooperative autonomy, meaning that cooperatives should be allowed to regulate their internal affairs free of outside influence, be it by government or any other actor
- economic contribution by members to the activities of their cooperative and participation of the members in the distribution of the positive results
- information to the members by the cooperative officers
- intercooperative cooperation, and
- concern for the community. The ICA added the principle of “concern for the community” during its Centennial Congress in Manchester in 1995 which adopted the ICA Statement. The longstanding debate on the question whether cooperatives should exclusively serve their members or whether they should also serve the community at large was, however, not re-opened. Nothing prevented the members of a cooperative in the past from working in a voluntary manner in favour of their community. The seventh ICA principle (Concern for Community), apart from not being a legal rule, leaves the “concern for the community” to be specified “through policies approved by their members”. By law, cooperatives are meant to further their members’ interests. Except where political and legal arrangements compensate for the competitive imbalances, as in the case of social enterprises, enterprises are not designed to further the interests of society at large. According to the cooperative experience, the well-being of the members of cooperatives contributes to that of the community.

4.3 Scope of the cooperative law

The legislator must consider the scope of the cooperative law. A frequent question is whether the law should only apply to cooperatives or also to other forms of self-help and/or social economy actors. The answer will likely vary according to whether the law is to promote the activities/objectives of these actors, and/or whether it is to regulate the legal form of these actors. The above discussion of the social economy phenomenon, as well as that of Paragraph 7.(2) of ILO R. 193 provide some insights. The regulation of an activity/objective may concern several legal types.¹⁵¹ Regulations of legal types should however be limited to one type. The most widely found typology of legal entities¹⁵² and their interconnection with government structures do not allow for the reproduction of knowledge necessary to administer more than one type at a time. In addition, legislation on all forms of self-help and/or social economy actors in one law would necessarily tend to neglect the informal (defined as not reachable by state law¹⁵³) and work in favour of the formal sector. Besides, the administration of several types through one law would be costly.

4.4 Nature of the cooperative law

4.4.1 Public or private law?

Where the legal system distinguishes between public and private law, the categorization of the cooperative law depends on its scope.

If it is to regulate a cooperative sector defined as such, it will be part of public economic law and should include rules on the establishment, the set-up and the powers of a supervisory authority, possibly also on a promotion authority in addition to rules on the formation, structure, operations and dissolution of cooperatives. If, on the other hand, it is only to propose to potential cooperators a mode of organization which will permit them to develop their activities in an autonomous manner, then it will be part 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 human rights, democracy and the rule of law, private law is the logical choice, since government is not seeking to be involved in the activities of cooperatives.

While related to the question discussed here, the question discussed earlier of a legal policy choice in favour of a cooperative law which maintains/restores the cooperative distinctiveness must not be confused with it.

¹⁵¹ Which is the case with the 2004 British Act on Community Interest Companies, the 2003 Finnish Law on social enterprises (Laki sosiaalisista yrityksistä 1351/2003), the 1991 Italian Law on social cooperatives (Law No.381) and the Spanish Ley 5/2011 de Economía Social (Law on social economy).

¹⁵² For reasons of legal clarity and security the list of legal persons recognized by most, if not all, legal systems is limited. It does not differ substantially from one jurisdiction to another.

¹⁵³ See Part 2, Section 3.2, Informality and cooperative law.

4.4.2 Development law

ILO R. 193 discontinues the split of the world into first, second, developed, less developed countries.¹⁵⁴ This is not tantamount to saying that all countries have the same development needs. The cooperative law might well have to also accommodate specific development needs. However, the constraints imposed on cooperatives and the privileges granted to them in the past in view of development, or in the name of development, may no longer be acceptable. Not only are they incompatible with the fact that cooperatives are part of the private sector,¹⁵⁵ they are also incompatible with development requirements.

In the past, development efforts of states often ended up in managing cooperatives on a day-to-day basis in order to make them fit modern, mostly imported law. What was originally meant to be provisional often became institutionalized and permanent. Public funding brought about tight control, thus closing the vicious circle of government involvement and a growing dependence of the cooperative system on the state. Not masters of their destiny, cooperatives saw state officials survey their formation and operations, define their activities or organize their horizontal and vertical integration and use the cooperative law to shape society at large. More concretely, this situation has often been characterized by:

- the obligation of cooperatives to limit their activities to a specified territory, coinciding more often than not with administrative boundaries. This obligation, allegedly for the sake of cooperatives' economic efficiency, not only contravened the freedom of the cooperatives, but it also contributed to their politicization. By the same token, the positive effects of competition on economic efficiency were excluded;
- compulsory membership which infringed upon the freedom of association;
- intervention in the management of cooperatives, more or less directly. For example, the state organized meetings to establish cooperatives; sometimes it simply created cooperatives *ex nihilo*, called for ordinary or extraordinary general meetings of cooperative members, meetings of the board of directors or of other organs/bodies of the cooperative and/or delegated state representatives to sit in these meetings, took decisions in lieu of the organs/bodies of the cooperative and selected, remunerated, closely supervised and at times replaced the officers or the personnel of cooperatives by state commissioners.

Proponents of the transplantation of so-called modern laws to the countries of the South in the past were guided by the "theory of the development of law". Law was seen as a technique, apt to be developed. They ignored the "theory of development

¹⁵⁴ See for example its Paragraph 4.

¹⁵⁵ The legal categorizing of cooperatives as belonging to the private sector must not be construed as disregarding the socio-political and economic categorizations, whereby cooperatives might be classified as part of the social economy or a third sector in some countries.

law”, which is rather concerned with finding out how development could be induced and supported by law. Law is not there to create social reality; it is there to structure it and make sure that in an open future cooperatives can thrive. Especially in order to accommodate rapid socio-economic change in a way which is beneficial for those concerned by the change, a number of rules might therefore have to be in the form of graduation clauses, i.e. clauses whose application ceases or which need modifying once the aim which was to be reached through those rules is attained.¹⁵⁶

Frequently it is mistakenly thought that the challenge of designing a development-enhancing law can be met by allowing for deviations from the cooperative principles through government decrees on key areas of cooperative principles.

4.4.3 Choice of the adequate legal instrument

The choice between the different legal instruments, i.e. the constitution,¹⁵⁷ law, ordinance, decree, regulation, government order, (government) model bylaws etc., is not a free one. The principles of cooperative autonomy and of the rule of law determine the choice.

The autonomy of cooperatives will only be achieved and/or maintained by respecting another principle, namely the principle of subsidiarity. Only matters which surpass the competence of an individual cooperative, which are of a democratically defined public concern or involve third party interests may be regulated through public norms, while everything else must be left to be determined through bylaws/statutes. Notwithstanding this, the cooperative law should be sufficiently detailed in order to avoid its character being altered through government rules. This is of particular importance in countries where laws take effect only once the relevant government decree of application is issued.¹⁵⁸

According to the principle of the rule of law, questions relating to cooperative principles must be regulated by law, whereas decrees or other administrative acts are limited to operationalizing the law, especially in matters that are of a temporary nature or which are subject to frequent changes, such as for example rules on fees and fixed interest rates. Once inscribed in the law, a rule cannot be overturned unless a competent court of law so requires or the law is revised. However, rules of whatever legal nature cannot nullify those contained in other texts having the same or a higher legal ranking. This is an additional reason for taking the systemic character of cooperative law into account when legislating.

¹⁵⁶ Parallels can be found in public international law, for example the graduation clauses in some of the multilateral trade agreements under the GATT regime. See also the neglect of regulating effectively the phasing out of government involvement under the so-called British Indian Pattern of Cooperation.

¹⁵⁷ A growing number of national constitutions recognize cooperatives. See for example Bangladesh, Brazil, Columbia, Guyana, Italy, Mexico, Namibia, Portugal, Spain, Thailand and Turkey.

¹⁵⁸ This is especially the case in countries with a French legal tradition.

4.4.4 One cooperative law or several laws?

In view of the wide range of cooperatives with differing activities, needs, membership bases, stages of development, sizes, degrees of complexity, objectives and inter-relatedness with other actors, it must be decided whether there shall be one law for all types of cooperatives (for example service, workers, consumer),¹⁵⁹ all types of activities (for example agriculture, housing, fishery, cattle raising, savings and credit, transport, supply, marketing etc.), all types of professions (for example fishermen, craftspeople, medical doctors, lawyers etc.), single-purpose and/or multi-purpose and/or multi-stakeholder cooperatives, and all levels of cooperative organization, one law with separate parts/chapters for every or some types of cooperatives/activities or several distinct laws. It might even be that there is no need for a separate cooperative law at all if the civil code, commercial or other laws provide for the regulation of cooperatives.¹⁶⁰

The choice has an effect on the legislative procedure, for example on the designation of the lead ministry in charge of the formulation of the law or the amendments to the law.

Worldwide one finds any thinkable combination, from many laws to no law. The trend is towards having one single general law covering all types of cooperatives because it is believed that:

- one law for all types of cooperatives, possibly with specific parts/chapters for specific types of cooperatives/activities,¹⁶¹ for example for worker cooperatives, housing cooperatives, savings and credit cooperatives or multi-stakeholder cooperatives best guarantees the autonomy of cooperatives, i.e. their power to regulate their own affairs as far as possible through bylaws/statutes, since the degree of detail in such a general law will be lower than in a multitude of laws
- this low degree of detail diminishes bureaucracy
- one general law avoids the fragmentation of the cooperative movement that might occur where different types of cooperatives are registered under different acts and placed under the supervision of different public authorities with, perhaps, heterogeneous policies
- one general law contributes to legal security for those dealing with cooperatives. Legal security relates rather to structural and liability aspects than to a specific type of cooperative or activity

¹⁵⁹ For a recent publication on such taxonomy, see Birchall.

¹⁶⁰ As, for example, in the cited cases of Denmark and Ireland.

¹⁶¹ Model suggested by the Ley marco para las cooperativas de América Latina. See Part 2, Section 4.1.2.1, Ley marco. para las cooperativas de América Latina.

- in the context of development constraints,¹⁶² one general law is the most adequate tool to reach congruency between development-oriented, member-oriented and self-sufficiency goals of cooperatives.

The discussion has to also take into account the shift toward perceiving cooperatives as a choice that (potential) cooperators make to organize their activities. This choice might include going beyond the self-help approach and serve (also) the needs of non-members in a cooperative way. To be considered especially are the activities and objectives of the social economy type. This might be a reason for having several laws. The same might be necessary to accommodate the special needs of small cooperatives.¹⁶³

4.4.5 Language of the cooperative law

Understanding the law is a prerequisite for its implementation. It is not unusual that the primary addressees of the cooperative law neither master the official language in which the text is written, nor do they 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 as far as possible without having to resort to other texts are some of the means to improve access to the cooperative law. But, the cooperative law cannot, and must not, be an exception within its legal system. Its language must be consistent with that of other legal texts so as to ensure coherence of the legal system. The question also relates to the legislative style. There are two main styles: codes and stand-alone laws.

For the rest, understanding the law is a matter of disseminating it properly.

4.4.6 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. The degree of detail should therefore be reflected upon. A brief law, only defining an organizational framework for cooperatives, necessarily refers to other provisions, making it less intelligible and therefore relatively difficult to understand (see previous point). From a practical point of view, a detailed law thus seems preferable. However, in reality detailed texts, while avoiding cross-references to other texts, develop a degree of detail which risks impeding the autonomy of cooperatives by limiting notably the space they may fill with their bylaws/statutes. On the other hand, detailed laws prevent an excessive resort to government instruments.¹⁶⁴

¹⁶² See and Part 2, Section 4.4.2, Development law.

¹⁶³ See Part 3, Section 9, Simplified cooperative structures. See also Münkner, Reform des Genossenschaftsrechts als Reaktion auf die Herausforderungen des wirtschaftlichen und sozialen Wandels.

¹⁶⁴ See Part 2, Section 4.4.3, Choice of the adequate legal instrument.

The time dimension has to be taken into consideration as well when deciding on the format. Often, details in the cooperative law pertain to time-bound political, social and economic issues which change more or less rapidly over time, thus requiring adaptations of the law. Frequent changes of the law not only consume resources but they also affect public opinion about the value of a law. Law *is* not; it *becomes* over time. And frequent changes do not match the long-term perspective of cooperative development, for which legal stability/continuity is vital, and they meet the inertia of administrators.

4.4.7 Sequence of the matters to be contained in the law

There are many ways to present the sequence of the different articles/sections of a law. The sequence has no influence on the legal value of the articles/sections. However, the “life” of a cooperative or the subject matter may pre-determine to a certain extent this sequence. On the other hand, one may also think of the sequence of the different articles/sections from the point of view of those who will apply the law, i.e. the cooperative members, the organs/bodies or office bearers. These *Guidelines* try to marry these two approaches by suggesting a sequence which follows the phases of a cooperative from its formation to its dissolution, on the one hand, while regrouping those articles/sections which pertain either to the members, to the organs/bodies or to office bearers, on the other. This approach results at times in repetitions.

Part 3: An ABC of a cooperative law¹⁶⁵

As legal entities, cooperatives have to be subject to legislation. Their structure, functioning and especially their position vis-à-vis third parties have to be regulated.

The following main topics of a cooperative law relate to all types of cooperatives. As discussed in Part 2, Section 4.4.4 (One cooperative law or several laws), this approach must not be construed as meaning that there should be one single law on all types of cooperatives. Other options are just as valid.

The main contents of a cooperative law are:

1. Preamble
2. General provisions
3. Formation and registration
4. Membership
5. Organs/bodies and management
6. Capital formation, accounts, surplus distribution and loss coverage
7. Audit
8. Dissolution
9. Simplified cooperative structures
10. Horizontal and vertical integration
11. Dispute settlement
12. Miscellaneous

1. PREAMBLE

If the legal system of the country permits it, and if the legal nature thereof is clearly stated, the cooperative law could start with a preamble. The preamble will guide the interpretation of the law, which is all the more important where genuine

¹⁶⁵The double use of the indefinite article is to emphasize again that these Guidelines do not but suggest a possibility.

cooperatives are not yet solidly implanted. The preamble could indicate the following matters:

- the role and the function of cooperatives in society in general and in the economy of the country in particular
- the character of cooperatives as private and autonomous organizations having access to all lawful activities
- the involvement of the government which will be limited to the registration, dissolution and promotion of cooperatives and to general normative control
- equal treatment of cooperatives and their members with regard to other business organizations, i.e. they will not be discriminated against, either negatively or positively, in order to avoid distortions between competitors and in order to avoid the formation of bogus cooperatives. Equal treatment in the legal sense means identical treatment with other business organizations, where possible, but different whenever the specific nature of the cooperatives so requires.¹⁶⁶

2. GENERAL PROVISIONS

2.1 Definition of terms used in the law

A glossary of key legal terms used in the law could be included in the text, annexed to it or contained in a separate document. This is all the more necessary where the law marks a change of policy, 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. Deviations from internationally accepted definitions might be kept to a minimum and might need special explanation.¹⁶⁷

2.2 Application of other norms

Because of a widespread false assumption to the contrary, the law must indicate that the registration under the cooperative law does not exempt cooperatives from abiding by other legal rules of the legal order, especially not from those regulating their activity. For example, registration under the cooperative law does not exempt cooperatives from the duty to apply for a licence to exercise banking activities

¹⁶⁶ The most discussed issue in this context is taxation of two related items which are typical for cooperatives, namely surplus and patronage refunds. As said, surplus produced on transactions with the members is the result of a cooperative specific way of calculating costs (near costs). The French term “trop-perçu” is self-explanatory in this context. (In English, payment beyond the amount due.) Patronage refund, paid pro rata of the business of the members with their cooperative, is a deferred price reduction or a correction of the price calculation at the end of the financial year, should the economic risk included in the original cost calculation not have materialized. If surplus may therefore not be equalled with profit, it should not be taxed as such. See also Part 3, Section 6.2, Surplus distribution at the end of the financial year.

¹⁶⁷ For a glossary of cooperative specific terms, see Münkner and Vernaz.

where the banking legislation requires an authorization for the exercise of such an activity.

The cooperative law might also have to provide for a reference to other laws in case of lacunae in this law.

2.3 Definition of cooperatives: Field of application of the law

The universally recognized definition of cooperatives as contained in ILO R. 193, Paragraph 2 not only reflects a certain understanding of what cooperatives are, it also preshapes the contents of the whole law. It reads: “A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise”.

The legislator might consider the following additions. Besides uniting voluntarily, the potential members should also come together on their own initiative. It might also be worthwhile considering the definition contained in ILO R.127, the “predecessor recommendation” of ILO R. 193 as it contains valuable additional elements, especially as far as the economic participation and risk and benefit sharing are concerned.¹⁶⁸

Rather than copying this or another definition, it is advisable to formulate a customized one where the local context so requires, whilst paying respect to the wider legal framework as developed under Part 2, Section 4.1 (The wider legal framework).

The definition will also depend on the legislator’s choice between a single law governing all types of cooperatives and several specific laws.

The definition and the subsequent rules must reflect those features which best distinguish cooperatives from other forms of business organizations, namely the cooperative identity principle and the principle of member promotion.¹⁶⁹ The identity principle means that members were the co-founders and that the members are co-financing the cooperative of which they are the co-owners, co-managers, co-controllers, co-users and co-beneficiaries and the debts for which they have co-liability. The principle of member promotion means that the betterment of the

¹⁶⁸ ILO R.127 may still be used as a guide despite the fact that ILO R. 193 “revises and replaces” it (see ILO R. 193, Paragraph 19). Its Paragraph 12 defines cooperatives as follows: “[Cooperatives are] association[s] 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”.

¹⁶⁹ See above differentiation of cooperatives from stock companies, Part 2, Section 2.2, Distinction between cooperatives and stock companies. This applies only under certain conditions to cooperatives which serve non-members. See also Part 2, Section 1, General.

situation of the members is preferred to the production of high returns on invested capital. The combination of these two principles constitutes the dual nature of cooperatives. They are groups of persons (associations) and economic enterprises at the same time or, more precisely, they are a group of persons who have an enterprise, i.e. cooperatives are not investor controlled enterprises, but associations of persons who work towards commonly shared objectives through a joint enterprise. Although this enterprise must be run in a profit oriented way, it is distinct from capitalistic enterprises in that it is oriented towards its members' interests and not towards its own interests or the interests of investors.

The definition of cooperatives is not only to differentiate them from capital-centred organizations, but also from non-profit organizations, from charity organizations and from other possible forms of self-help organizations, as well as from other social enterprise actors.

Furthermore, the definition should be written into the law as this helps:

- the government to carry out the normative functions of the state
- to distinguish genuine cooperatives from false ones
- to determine the obligations and rights of the members, as well as those of the organs/bodies of the cooperative
- to specify the qualifications and duties of cooperative officers concerning capital management and serving the interests of the members according to the dual nature of cooperatives (associations and enterprises)
- to state minimum rules concerning accountancy and audit in order to further the efficient use of financial resources, the adequate recognition of human capacities, as well as ensuring member promotion
- to resolve the conflicts that might arise between cooperative law and those other laws which, together with the cooperative law proper, constitute the cooperative law in the broad sense, for example tax laws, labour law, competition law, accounting standards etc.¹⁷⁰
- to justify equal treatment of cooperatives, in the sense explained above
- to facilitate the evaluation of the economic, social and societal impact of cooperatives and
- to promote international cooperation.

The definition of cooperatives is not limited to primary cooperatives. It also applies to federated structures, secondary and tertiary cooperatives or unions and federations, if they are allowed to carry out an economic activity.

¹⁷⁰ See Box 2.

Finally, groups and organizations defined by similar criteria as cooperatives, but which do not come under the cooperative law, could be listed in the law by way of a so-called negative definition, especially if they are regulated by other laws of the country.

2.4 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, but it makes the application of the law more complicated because it refers to external texts. Another solution is to draw up a list of the cooperative principles, taking care not to give this list a limiting and definite character. This could be translated by the use of expressions such as “among others ...” or “in particular ...”. Thus, the reference would include possible changes.

Whatever the solution, it is important that the nature of the referred to or cited cooperative principles be expressly stated and that the cooperative principles not be written as if they were legal norms, because that would limit the legislator in making adaptations of these principles to the national circumstances and, in fact, the respect of these principles would be rather improbable. It would also limit the autonomy of cooperatives. Likewise, legal rules must not be written in the form of principles, because in that form they are not applicable and will most likely call on government to replace the legislator by issuing regulations which go beyond their nature of making the rules of the law operational, where necessary, but not to regulate something in their stead.

What matters is not that each of the principles be followed to the letter, but that the principles are respected in their combination, spirit and totality. For example: the first principle (Voluntary and Open Membership), the so-called open door-principle, will have to be restricted where the reserve fund is divisible; the open-door principle needs weighting against the prohibition to transact with non-members contained in some legislations. It is also to be considered that in addition to the seven cooperative principles, which are under discussion in these *Guidelines*, there are others of varying scope and validity.

3. FORMATION OF COOPERATIVES

3.1 Registration

The recognition, and thus the protection, of cooperatives by the state manifests itself in the registration of their name and all other information justifying their status as a legal person in a public or at least publicly recognized register.

Noting what happened during past decades in a number of countries, it appears that the law must foresee severe sanctions against any abuse of the name “cooperative”.

The granting of the status of legal entity is, as a rule, motivated by the wish to favour the participation of private persons in organized economic activities, since these are judged to be more viable. The fact that the participating persons are financially not liable beyond the amount of the shares subscribed, unless decided otherwise in the bylaws/statutes, is an incentivizing factor to engage in legal entities. As far as cooperatives are concerned, 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. But, if members are not to bear personal liability for the activities of their cooperative, then only such a distinction will allow for a shift of liability to an independent entity with legal person status.

3.2 Types of registration

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

According to the first option, which complies best with the rule of law, a cooperative must be registered once the conditions laid down in the law are fulfilled. If, for whatever reason, prior approval is necessary, the discretionary power of the approving authority must be strictly and effectively limited by law.

3.3 Registration authority

The separation of state powers, the legal nature of the cooperative law, the definition of cooperatives and the use of the registration procedure as a means of an a priori 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, as it requires legal knowledge and the attribution of legal personality is an act with considerable legal consequences. But experience has also shown that an authority specialized in cooperative matters, and possibly helped by personnel seconded by the cooperative movement, is well placed to handle registration issues.

The legislator has to ensure that the registration be conceived as a local service and that the potential cooperators have to deal preferably with a single authority only. Where different authorities are involved, these should communicate with each other and vest the power to deal with the potential cooperators with one of them.

3.4 Registration procedure

In no case must the registration procedure hinder people from forming entities in the way that suits them best.

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

Documents to be attached to the application for registration are generally:

- the minutes of the constitutive general assembly, with the signatures or finger prints of all founder members. If the bylaws/statutes were adopted on the basis of model bylaws/statutes, the minutes must document a detailed discussion of these model bylaws/statutes
- a sample of the signatures of the persons with the right to represent the cooperative
- several copies of the bylaws/statutes with the signatures or the finger prints of all founder members
- the report on the results of an economic feasibility study concerning the planned activities of the cooperative. This study should be carried out by a cooperative apex organization or another recognized structure. Where there are no such structures yet, government may temporarily carry out this task. The task must not be given to the registration authority in order to avoid it being party and judge at the same time. The objective of this requirement, which is not imposed on the founders of other business organizations, is not to hamper the freedom of potential cooperators, but to see to the interests of the members of the future cooperative and of potential business partners, since the risks these are running are greater than those usually permitted for other types of enterprises, because cooperatives do not have a minimum capital and, generally, their capital base is weak. The legislator must, however, refrain from such preventive measures if it cannot exclude abuses of power in connection with this feasibility study
- a list of the persons entitled to file the application for registration and to notify all subsequent changes to be made to the registry
- a document showing that an adequate portion of the total amount of the member shares has been paid up and stating the period of time within which the remainder must be paid.

The establishment of a speedy and impartial registration procedure is a first step by the state towards facilitating the development of a genuine cooperative system. To this effect, the following procedure is proposed:

- a receipt stating the deposit of the application for registration and listing the documents presented, duly signed and dated, will be given upon presentation of the documents
- registration will be concluded within a short time period. One certified copy of the bylaws/statutes, 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 person
- a refusal to register must be justified in writing and notified to the persons who requested registration
- in the case of such a refusal, the founders may appeal before a court (to be specified) which should give a decision within a brief time period
- if within the required time limit, no refusal has been notified, or if the court has not given its decision, registration will be presumed. The registration authority will also in this case, and within a fixed and brief time period, send a certified copy of the bylaws/statutes, indicating the number and date of the presumed registration to the cooperative
- whichever its type, the registration should be published within a fixed and brief time period in the appropriate official, easily accessible media that are generally used by the authorities. The publication should match the requirements of modern business transactions, i.e. cover at least the potential geographical area of activity. In case the registration is not published within the time limit set, the cooperative will be presumed registered and the person not having fulfilled his duties will be financially liable for the consequences
- the fees for the registration and publication must in no case be prohibitive.

Especially where the registration becomes effective with its publication only, cooperatives must have the right to demand that the time periods mentioned be brief and respected by the registration authority.

Only registered, in some cases registered and published, or known 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 liable for the consequences.

3.5 Nature and effects of the registration

By registering (and publishing the registration, where necessary), the state confers legal person status on the cooperative. The status signifies that the cooperative is responsible and liable as a legal entity, independently of its members and with perpetual succession. As a legal entity, the cooperative has rights and duties. It can acquire property rights, contract obligations and debts, develop economic activities and be party to law suits. As with companies, and in accordance with

the legal system in question, this legal capacity will be infinite or limited¹⁷¹ by the objective/purpose of the cooperative concerned.

The legal person status includes the right to own subsidiaries in another legal form than a cooperative.¹⁷²

The members will neither be individually responsible for any acts performed in the name of the cooperative, nor will they be liable beyond the amount of the subscribed shares for the debts of the cooperative, unless otherwise decided through the bylaws/statutes.

The often-used formula according to which cooperatives were “the mandatories of their members” needs careful consideration. The question is whether cooperatives act on behalf of their members as their agents or whether they act on their own behalf when dealing with third parties. On the one hand, cooperatives are legal persons. Once registered, acts performed on their behalf exclusively commit them; i.e. cooperatives are independent of their members. On the other hand, because of the close involvement of the members in the decision-making processes and because of the special nature of the transaction between the members and their cooperative, they could be seen as the executing agents of the members.

The status of acts performed on behalf of the cooperative during the period from its constitution until its registration (and the publication thereof, where necessary) must be clearly defined.

4. MEMBERSHIP

Membership is the single most important issue to be dealt with by the law as cooperatives are member-centred organizations.

4.1 Membership qualifications

The universally recognized definition of cooperatives allows for both physical/natural and legal persons to be members also of primary cooperatives. Thus, these cooperatives may be composed of physical persons only, of legal persons¹⁷³ only or of a mix of the two.

However, many legislations exclude legal persons from membership in primary cooperatives. Generally, two types of arguments are put forward for this limitation.

¹⁷¹ Especially in countries following the Anglo-Saxon legal tradition.

¹⁷² The question relates to, but is not identical with, the establishment of cooperative groups as one of the means to improve external financing, see Part 3, Section 6.1, Financial resources.

¹⁷³ The term “legal person” as used here comprises business entities which are not legal persons, for example the sole proprietor company.

The first is to say that membership of capital centred legal entities in cooperatives is contradictory to the very idea of cooperatives being not-for-profit organizations. This argument confuses the nature of cooperatives and the motivation of the cooperative members. The second argument evokes the risk that physical person members will be overruled by legal person members. This risk is real, but it can be reduced as follows:

1. Mixed membership is voluntary and can be avoided within the limits of the cooperative principles by physical person members who do not want to admit legal person members to the membership.
2. The voting power of legal person members, in those primary cooperatives which also have natural person members, can be limited so as not to allow these legal person members to outnumber the votes of the natural person members or to take decisions by themselves.

Whether mixed membership is an option should be considered also in terms of the economic and other benefits that can be had by mixing different types of members in terms of scope and scale, knowledge transfer, risk sharing etc.¹⁷⁴

Some societies are organized on the basis of extended families, or even larger groups, as the smallest social unit which does not have legal person status. These entities may be admitted as members in cooperatives, provided they are stable. One would have to make certain, however, that the decision-making procedure within the cooperative is not affected by admitting such groups as members and that the democratic rights of individual members are not infringed upon. In certain circumstances the admission of such groups as members might facilitate the functioning of the cooperative by permitting it to respect the decision-making procedures of the existing social environment, notably in matters concerning the management of natural resources.

4.2 Restrictions concerning age

The admission of legal minors as members is generally an exception to the civil law. Without intending to unnecessarily restrict the membership of economically active minors, the possibility of minors to affiliate themselves to a cooperative needs careful studying of the implications in terms of responsibility and liability, the right to vote and the eligibility to posts of responsibility. In order to avoid joining a cooperative becoming a means to access a position which would not legally be accorded to minors individually, the number of minors in a cooperative and their rights must be limited. Notably, minors must be prevented from being able to control the cooperative. Exceptions might be made for school and student cooperatives.

¹⁷⁴ See Göler von Ravensburg.

4.3 Minimum number of members in primary cooperatives

To respect freedom of association, restrictions on the number of members of a cooperative should be limited. The economic viability of cooperatives with too few members is, however, generally speaking, precarious. Under such conditions, granting them legal personality might go against the interests of their potential partners and creditors, as well as of those of the members themselves. This is why most legislations do require a minimum number of members, at least three. Below this number the associative or group entrepreneur character of cooperatives becomes doubtful.

The experiences of a country might require that different minimum numbers be fixed according to the type of cooperative or according to other criteria. Thus the number might be higher for consumer cooperatives than for worker cooperatives, the number for other types of cooperatives falling in between.

4.4 Maximum number of members in primary cooperatives

In theory, the open-door principle does not authorize any restriction on 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 absolute upper or relative limits for the different types of cooperatives.

One might note that, in general, the problems of administration 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 themselves with their cooperative. Decentralization by means of regional assemblies and/or assemblies by sections, combined with a more effective administration, may make up for some of the negative consequences of large memberships, but they may not make them disappear. The problems vary also with the type of cooperative. Thus, a high number of members in a consumer cooperative has little influence on the decision-making processes, whereas the necessarily high number of members in a savings and credit cooperative requires rather complex organizational and work mechanisms. Producer and worker cooperatives will most likely suffer if the size of membership outgrows certain limits. The question will have to be left to the members for decision, if necessary.

4.5 Admission of members

4.5.1 Principles

According to the open-door principle and within the limits of the objective of the cooperative in question, all persons who request membership 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 condition sine qua non for the success of the cooperative.

The policy adopted by cooperatives in matters of capital distribution has an influence on the number and quality of the members. The risk of membership applications motivated by the search for a lucrative investment and/or by speculation may be avoided by limiting the possibility to have non-member business and by not distributing the profit gained on transactions with non-member users, and/or by designating at least part of the reserve fund as locked-in, indivisible capital according to the third cooperative principle (Member Economic Participation), and/or by reimbursing shares in the event of termination of membership or liquidation at nominal value only.

The residence of the applicant should not be decisive for admission unless the objective of the cooperative has it as one of the keys for its success, in which case the bylaws/statutes should foresee the necessary clause.

A number of cooperative laws permit the exclusion from membership of persons who do not have a clean criminal record. Unless the punished behaviour is likely to harm the cooperative, the members should assume their general social obligations by helping to reintegrate such persons into society.¹⁷⁵

4.5.2 Admission procedure

Given the associative character of cooperatives, the admission of new members must be decided by the general assembly. For practical reasons, the board of directors may decide, but the general assembly will keep, if it wishes, a right of confirmation or veto, to be exercised during the first general assembly 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 in the law that final act 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 or the court of law has not met the time limit set by the law for the decision, membership is presumed.

4.6 Resignation/withdrawal

The right of the members to resign or withdraw must be guaranteed by the law which must see to it that administrative acts or the bylaws/statutes of the cooperative do not have an adverse effect.

¹⁷⁵ Cooperatives are an enterprise form through which in Ethiopia for example prison inmates learn to reintegrate into society.

Withdrawal may be restricted until a minimum period of membership has expired, or be subject to discharging the mainly financial obligations incurred towards the cooperative. These conditions must in no case be excessive, and the required time period for notification must be reasonable.

The effect of the resignation/withdrawal is the immediate or deferred termination of the rights and obligations of the resigning/withdrawing member. Remaining under certain conditions financially liable, the resigning/withdrawing member has a right to have his shares reimbursed, in principle at nominal value. However, the cooperative must have the possibility to temporarily withhold the reimbursement if an immediate reimbursement would seriously affect its functioning. In this case, the cooperative will pay a limited interest on the sum to be reimbursed. The term of withholding the reimbursement must be specified and its length reasonable.

4.7 Exclusion and suspension

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

Depending on the kind of misconduct, the cooperative might also decide to suspend all or parts of the rights of a member for a certain period of time.

In both cases, the member concerned must be heard and, at his request, the motives for the decision of the cooperative must be communicated to him in writing. The member may appeal before the general assembly of the cooperative, use the dispute settlement procedures provided for in the law or in the bylaws/statutes and, as a last resort, has the right to appeal to a court of law which must be specified in the law.

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

4.8 Obligations and rights of members

4.8.1 Principles

Again, the sequence by which matters are dealt with in the law is not indicative of any ranking. However it does at times reflect the weight given to a specific item. Thus, emphasis is put here on the members' obligations which are far less discussed than members' rights. Membership is linked to rights. These are conditioned by the discharge of obligations. The cooperative law and subsidiary legislation must ensure that this rule be respected, even in cases where general social rules tend to override these rights and obligations. In no case must family ties, race, age, religion or any other affiliation to a group affect the independence and the equality of the members. This is in no small way a tribute to the cooperative principles.

4.8.2 Obligations

4.8.2.1 Personal obligations

By belonging to a cooperative, members commit themselves to:

- respect the bylaws/statutes, the decisions taken by the general assembly, whether they voted for their adoption or not, as well as the decisions taken by the management which are in line with the decisions of the general assembly
- abstain from any activity detrimental to the objective of their cooperative. Frequently, membership in several cooperatives having the same objective is considered as harming the cooperative(s). However, this need not be the case
- participate in the activities of the cooperative. This obligation may not, however, be enforced (see also below “Other obligations”).

4.8.2.2 Financial obligations

Membership in a cooperative implies the following financial obligations:

- each member must subscribe to and pay for the minimum number of shares fixed in the bylaws/statutes
- each member is financially liable for the debts of the cooperative. The minimum liability is the value of the shares to which the member has subscribed. If not specified in the law, the type of further financial liability of the members must be dealt with in the bylaws/statutes in order to protect the interests of third parties
- each member might have to purchase additional shares
- in order to improve the creditworthiness of cooperatives and in order to incite the members to actively contribute to the success of their cooperative, the law or the bylaws/statutes may impose an obligation on the members to make supplementary payments. The same may apply in case the cooperative is unable to pay its debts (so-called “liability to further call” or “reserve liability”). Together with a regulation to this effect in the bylaws/statutes, 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 proportional to the transactions made by each of the members with the cooperative over a set period of time, specified by using the same method as used for the calculation of the distribution of surpluses, or it may be determined according to the number of shares held by each member.

Because of the legal person status of cooperatives, the financial liability of members commits the members towards their cooperative only, and not towards the creditors

of the cooperative. It extends beyond the termination of membership, for a period of time to be specified in the law or in the bylaws/statutes. As a rule, a member must contribute to the discharge of only those debts which are on the balance sheet at the time of the end of his membership.

4.8.2.3 Other obligations

One might envisage obliging the members to use, to a certain extent at least, the services or installations of their cooperative. Although favouring the development of the cooperative in the short run, such a rule might in time have a negative influence on the competitiveness of the cooperative and it might violate competition law in those cases where the members themselves run a business. Therefore, rather than reasoning in terms of legal obligations, one might consider that the members have the moral duty to work with their cooperative. Furthermore, it is up to the responsible persons within the cooperative to offer sufficiently attractive services to the members.

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 services in question.

In order to guarantee certain stability in specific cases, the cooperative might have to conclude in addition individual contracts with each of its members.

4.8.3 Rights

4.8.3.1 Personal rights

Each member has the right to:

- ask for those services which form the objective of the cooperative
- ask for education and training by the cooperative according to the bylaws/statutes or the decisions of the general assembly
- use the installations and services of the cooperative
- participate in the general assembly, propose a motion therein, and vote
- elect or be elected for an office in the cooperative or in that of a higher level structure to which his cooperative is affiliated
- obtain at all reasonable times from the elected responsible persons in the cooperative information on the situation of the cooperative and
- have the books and registers inspected by the supervisory council, if any
- jointly (necessary number to be determined) the members can also convene a general assembly and/or have a question inscribed on the agenda of a general assembly and
- ask for an (additional) audit.

4.8.3.2 Financial rights

The members have the right to:

- receive a share of the surplus at economically reasonable intervals in the form of a patronage refund, paid pro rata of their transactions with the cooperative, and/or a limited interest on the paid-up shares
- ask, when terminating their membership, that the paid-up shares be reimbursed at nominal value. Losses or devaluations may be deducted from this amount. The limitation to the nominal value is to prevent members from withdrawing for speculative reasons. As mentioned above, the reimbursement may be deferred in case it would otherwise endanger the viability of the cooperative. However, this deferment must not undermine the right to withdraw
- receive, in the case of liquidation, a share of the remaining sum, if any, except of those funds which were declared indivisible by the law or the by-laws/statutes and as required by strict cooperative principles (see third cooperative principle, Member Economic Participation). In this case, the remaining monies must be credited to another cooperative, a vertical cooperative structure of which the cooperative was an affiliate or to a charitable or public interest organization.

4.9 Provisions relating to member employees

The employer/employee relationship in cooperatives is a complex issue when the employees are members of the cooperative and, consequently, their own employers. These members might have contradictory interests in terms of membership, on the one hand, and working conditions (working hours, salary, trade union rights etc.), on the other hand. The problem varies with the different types of cooperatives.¹⁷⁶

- In service cooperatives, it is seldom that members are employees of their cooperative.
- In consumer cooperatives, the employees are frequently members of their cooperative. However, the object of the cooperative is not identical with that of the labour contract. To prevent the interests of member employees from dominating, the voting rights of these members must be limited in cases relating to work conditions, or the general assembly must delegate its decision-making power in these matters to the board of directors. Election of such members to posts of responsibility might have to be regulated accordingly. In general, the risk of a conflict is low as member employees will refrain from encroaching upon the interests of the employer since they are themselves their own employer. However, this might only be true where membership in the consumer cooperatives is not a pure formality.
- In worker cooperatives, the conflict is obvious. Here, the object of the labour contract is “cooperatized”. It is identical to the object of the cooperative.

¹⁷⁶ See in this context ILO R. 193, Paragraph 8.(1)(b).

The various aspects of labour law might need different treatment. Where the rules on social protection, workplace and product safety should apply in all cases, the rules of labour law in the narrow sense might require adaptation or not apply at all to these relationships because the members freely consented to organize their work according to cooperative principles, instead of seeking to establish a work relationship. Some legislations do see, however, the cooperative – a separate legal person – as the employer and the individual members as employees whose relationship is governed by a labour contract in addition to the membership relationship governed by the bylaws/statutes and which they accept upon admission.¹⁷⁷

5. ORGANS/BODIES AND MANAGEMENT

5.1 Principles

The functioning of cooperatives, as opposed to that of capitalistic companies, depends on the participation of the members who must be able to exert an effective influence on the affairs of the cooperative. Nevertheless, as a legal entity operating as an enterprise, the latter must be able to act to a certain extent independently. The law must therefore provide for the principle of democracy and the principle of economic efficiency to be applied simultaneously; i.e. it must cater for the two elements of the definition of cooperatives, the association element and the enterprise element. The internal organization and the sharing of powers between the different organs/bodies must reflect this dual nature. Broadly speaking, matters relating to the associative character of the cooperative, for example elections to offices, as well as all important decisions, must reflect the will of all members regardless of their financial contribution. They are to be dealt with by the general assembly. Matters pertaining to the enterprise of the cooperative are to be dealt with by a board of directors. The day-to-day running of the enterprise should be delegated by the board of directors to a (professional) manager who works under the supervision of the board of directors. This demarcation of powers is to avoid inefficiencies that arise where a non-informed membership retains too much of the management powers and to prevent a loss of cooperative identity where the membership loses its effective control because the management uses its information without properly consulting with the membership.

These theoretical considerations need testing against a reality where for various reasons real power is ever more shifting from the general assembly to the supervisory council, if any (see below), and from there to the board and further on to the management. The division of power which modern cooperatives might require must be balanced with efficient control over the course of this shift. This presupposes, at the very least, professionalism at all levels, starting with the members, and efficient internal and external control (audit) mechanisms.

¹⁷⁷ See ILO, Meeting of Experts on Cooperatives; idem, Labour Law and Cooperatives.

In many societies the position and role of elders must be considered in this search for effective power-sharing.

- Clear power-sharing also allows the civil liability and penal responsibility of those in charge of running the cooperative to be established more easily.
- Based on these considerations, power should be shared among at least:
 - a general assembly and
 - a board of directors, which is sometimes also called a “management committee”.

Although the cooperative is not required to have a control unit, it is advisable to at least provide for the possibility of its nomination and leave the decision to the general assembly. Cooperatives which have such an independent organ/body, a “supervisory council”, “supervisory commission” or “control council”, which acts on behalf of the members as a mini general assembly so to speak, seem to function better than those without it because the members often lack the necessary qualifications to exercise an effective and continuous control over the board of directors and the management, if any.¹⁷⁸

This dual system does not replace internal control mechanisms of the board of directors, such as internal auditors; nor does it replace the obligatory external audit of the cooperative.

As for the optional post of “manager”, it is not an organ/body of the cooperative since its powers are delegated powers of the board of directors.

5.2 General assembly

5.2.1 Composition

The ordinary and the extraordinary general assembly, composed exclusively of the members of the cooperative, is the supreme decision-taking organ/body of the cooperative. Third parties, especially investors, may possibly participate in the general assemblies, but they should not have voting rights.

An ordinary general assembly must convene at least once a year; an extraordinary general assembly may take place at the request of the persons entitled to call for it according to the law or the bylaws/statutes.

If the size of a cooperative in terms of territorial coverage or if the number of members is such that the necessary quorum is difficult to attain, or the proceedings of the general assembly become too cumbersome, or where in a multi-purpose

¹⁷⁸ For details, see Münkner, “Cooperative Law as an Instrument of State Sponsorship of Cooperative Societies”.

cooperative diverse interests so require, regional assemblies and/or assemblies by sections may be formed. These decentralized assemblies elect their representatives to a delegates' assembly which replaces the general assembly. The agenda of these meetings, as well as the mode of deliberations and voting will be decided at central level so as to ensure the same standards throughout the cooperative. In order to reinforce communication between the different parts, members of the board of directors and of the supervisory council, if any, should participate in the meetings of these decentralized assemblies.

These basic rules about the general assembly fit with the reality of most cooperatives. Generally, cooperatives are locally rooted, in the physical sense of the term. While this is a safeguard against quick shifts of their activities in the search for comparative business advantages, one must not exclude the cooperatives from being run without a physical centre and members being dispersed physically in such a way that even holding delegate meetings becomes inconvenient, if not impossible. New ways of production and communication neither require a stable physical production unit, nor an administrative centre or the physical presence of the members in order to hold a general assembly. Where this is required, the members may decide so in their bylaws/statutes. Otherwise, they should be free to discuss and vote using any technical device as long as abuses of rights can be avoided. What matters is the democratic control by the members, not their physical presence at meetings, although this may still help to generate and regenerate the necessary reciprocal confidence among the members.

5.2.2 Powers

As already mentioned, the dual character of cooperatives as associations and enterprises is indicative of the way in which powers must be shared amongst the general assembly and the board of directors. According to the definition of cooperatives, the members use the cooperative enterprise to attain certain economic, social or cultural objectives. The board of directors/management must have the necessary freedom which is indispensable for efficient management of the cooperative, whereas all decisions concerning the cooperative as an association must be taken by the general assembly.

Starting from this basic distinction, one may draw up a list of exclusive powers of the general assembly. These powers may not be transferred to any other body or person, not even by a unanimous decision of all the members as they form part of the cooperative distinctiveness which, in turn, is part of legal clarity and security.

Among these powers the most prominent one is the right and obligation to adopt and to modify the bylaws/statutes within the limits of the law and the universally recognized cooperative values and principles. This is why the bylaws/statutes are further developed in the following paragraphs.

5.2.2.1 Bylaws/statutes

5.2.2.1.1 Principles

The general assembly, or the constitutive first meeting of the founder members, stipulates on a matter in the bylaws/statutes where the law is silent, where the legislator leaves it a choice amongst several options, invites it to specify legal provisions or when the members decide to rewrite certain clauses of the law in order to make them easier to understand and/or more operational.

What has been said concerning model laws is equally valid for the bylaws/statutes. Although the adoption of model bylaws/statutes, recognized by the authorities, makes registration easier because of their supposed conformity with the law, their adoption should not be made compulsory. A further consideration is that the elaboration of the bylaws/statutes by the (potential) members is a unique learning/education opportunity. Experience shows that the opportunity to discuss cooperative values and principles amongst members presents itself only at the foundation of a cooperative and the more time is devoted to this discussion at the beginning, the less likely conflicts around the interpretation of the bylaws/statutes will arise during the operational phase of the cooperative.

5.2.2.1.2 Contents of the bylaws/statutes

5.2.2.1.2.1 Minimum obligatory content of the bylaws

The bylaws/statutes must deal with the following items:

- 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 legal entity already registered and as long as the public is not left in doubt about the limited financial liability of the cooperative and the type of financial liability of the members
- the locality of the head office, if any, its postal address and, possibly, the conditions for its transfer to another locality
- the definition of the objectives of the cooperative, including the indication of whether the cooperative is a single-purpose or a multi-purpose cooperative
- the conditions and procedures for admission, resignation/withdrawal, exclusion and suspension of members. The respective criteria must reflect the particular character of the cooperative in question, as also its being a primary, a secondary or a cooperative of an even higher level
- the value of, as well as the minimum and maximum number of, the shares to be subscribed by each member. It needs to be ensured that the economic means of the least affluent members form the basis for the decision, that the share value is high enough to support the envisaged objectives of the cooperative and that it incites the members to exercise their control rights. This latter point is to be considered especially in countries which allow for cooperatives to be set up without any share capital

- the procedure and conditions for the subscription and payment of the shares. Shares may be contributed in cash or by leaving a part of the surplus, to which a member is entitled, with the cooperative, in kind (by transfer of title, if any), as work/industry or as service
- the type of financial liability of the members for the debts of the cooperative
- the administration of the cooperative registers and the documents to be kept
- the conditions and procedures for convening and holding general assemblies (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, etc.)
- the limited size of the board of directors; the eligibility and qualification criteria concerning the various offices, the duration of the mandates and the reimbursement of their expenses and the expenditures of the manager, if any; the rights and obligations of these officers, the mode of their decision-taking
- the conditions and procedures for convening the board of directors and the supervisory council, if any (quorum, voting etc.)
- financing: capital formation, constitution of legal reserves and funds
- surplus distribution and loss coverage
- the distribution of the capital in case of termination of membership or liquidation of the cooperative
- definition of the financial year
- auditing (cooperative-specific financial, management and social audit and advice, possibly also societal audit); qualification of auditors
- conditions and procedures for voluntary dissolution
- dispute settlement procedures
- specification of any other legal matter and
- the procedure for modifying the bylaws/statutes.

5.2.2.1.2.2 Additional, non-obligatory content of the bylaws/statutes

Without being compulsory, the bylaws/statutes may also include rules on:

- the duration of the cooperative
- its geographical area of activity
- its affiliation to one or several secondary or higher-level cooperative organizations
- the nomination of a supervisory council
- possibly the nature and volume of transactions with non-member users. A balance must be found between the 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 remuneration of office holders. While it is true that according to cooperative principles office holders should not be remunerated, it is also true that thus financially weaker members may not be able to afford to take office. Remuneration should not be paid as a function of the turnover or the profit/surplus of the cooperative
- the number of additional or supplementary shares per member and the conditions of their subscription and payment
- the acceptance of non-member investments and the rights attached thereto
- the formation of regional assemblies and/or assemblies by sections, their decision-making, voting and number of delegates to represent the regional or sectional assemblies at the central level
- voting by proxy
- the establishment of education and other statutory funds
- the establishment of commissions/committees, their tasks, their term, the qualifications of their members and
- any other matter falling within the autonomy of cooperatives.

5.2.2.2 Other powers

In addition to drafting and modifying the bylaws/statutes, the general assembly has the power to decide the following matters:

- keeping of minutes of its meetings
- distribution of powers between the different organs/bodies according to the above-mentioned principles, and the adoption of internal regulations for each of them
- election and dismissal of the members of the supervisory council (if any) and the board of directors, unless the latter is to be nominated by the supervisory council. The more powers the board/management has, the easier it must be to remove it from office
- surplus distribution and loss coverage
- amalgamation, scission, conversion of the cooperative into another legal entity or dissolution of the cooperative
- decisions concerning the possible limitation of loans, deposits or investments
- nomination of auditors, the duration of their mandate and their remuneration
- examination of the auditor's report, as well as of the annual report (including the yearly activity plan)

- giving or refusing the discharge of board members
- adoption of the annual budget
- final decision on the admission, expulsion or suspension of members
- education and training of members and employees
- extension of the duration of the cooperative
- the decision on whether the board of directors may appoint a professional manager, member or not of the cooperative, and
- the possible creation of committees with specific tasks, and the duration of their mandate.

5.2.3 Decision making

5.2.3.1 Quorum

The mode of decision-making must respect the principles of democracy and economic efficiency. Fixing a quorum, i.e. the minimum number of members who must be present or represented for the general assembly to validly sit, deliberate and vote, constitutes a compromise between these two principles.

This quorum, most often expressed either in a percentage of the number of members at the time of convening the general assembly or in an absolute figure, or in a combination of the two, may vary according to the topic on the agenda of the general assembly.

Provision must be made for cases where the general assembly repeatedly fails to gather the required quorum. As a rule, a second meeting, to be called within a short period of time and with the same agenda, may decide regardless of the number of members present or represented.

5.2.3.2 Voting

In primary cooperatives the basic rule on voting is “one member/one vote”. This also applies to members being legal persons.

Exceptionally, (a limited number of) plural voting rights may be granted through the bylaws/statutes. The volume of transactions with the cooperative or other criteria might be used when allocating these rights. In no case, however, may plural voting rights be granted on the basis of the amount of financial contributions by a member. The plural voting rights may not be exercised when taking decisions on “important matters”, as specified by the law. Such “important matters” will most likely be those pertaining to the associative character of the cooperatives. Plural voting rights would rather be granted in matters concerning the activities of the cooperative enterprise. In no case must one single member be in a position to take decisions by virtue of the number of voting rights he is holding or representing.

In secondary and higher-level cooperative organizations, a system of plural voting rights may be applied without the above mentioned restrictions, but in line with democratic principles (see second cooperative principle, Democratic Member Control).

The law must also regulate the criteria for granting voting rights to delegates, i.e. members elected by regional or sectional assemblies, if any, to the assembly of delegates.

Should non-members or non-user members, mainly investors, have voting rights at all, then these must be regulated in such a way as to ensure that they cannot outweigh regular members. It must, however, be emphasized that voting by such persons constitutes a severe deviation from cooperative principles.

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 to be allowed, the proxy must be a member of the cooperative and should not represent more than two or three members, himself included.

At least important decisions should be taken by ballot in order to limit the influence of certain members, mainly the president of the general assembly. Elections should always be held by ballot.

Voting by mail, via the internet or any other technical means, 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 or possible and the right to participate is not limited.

5.2.3.3 Majorities

Generally, decisions may be taken by simple majority if the required quorum of members is present or represented. Decisions concerning the associative character of cooperatives, be it for example a modification of the bylaws/statutes or a decision on merging/amalgamating, dividing, dissolving, converting or on affiliating the cooperative with an apex organization, must be taken by a qualified majority, generally at least a two-thirds majority.

5.3 Board of directors

5.3.1 Principles

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

5.3.2 Provisions relating to the board of directors

The law must contain rules on:

- the eligibility criteria, including the question as to whether or not all board members must be members of the cooperative
- incompatibilities, be they of an economic, personal, political or other nature. For example, incompatibilities between being a member of the supervisory council, if any, and of the board of directors of the current or that financial year which is subject to control by the supervisory council. Also, members of the same family (to be defined) must not sit on the supervisory council and/or the board of directors of the current or that financial year which is subject to control by the supervisory council
- the duration of the mandate and the possibility to be re-elected
- the quorum and the mode of voting
- the qualifications of the members of the board of directors. These qualifications must be technical and personal. The board members may compensate a deficit in the first case by hiring a professional (non-member) manager, but nothing will replace a lack of confidence of the members in their representatives. In addition, the board members do not only act in the interest of the current members, but also in the interest of the members to come, especially as far as the management of assets is concerned
- independently of whether the cooperative has a professional manager or not, the board must be professional; i.e. the board members must have those qualifications which are necessary for their specific cooperative.¹⁷⁹ One of the differences between cooperatives and capital centred companies is that the responsible persons must be able to manage the assets of the cooperative, while at the same time provide services to the members, within the limits set by the bylaws/statutes and the decisions of the general assembly
- liability of the board members. The liability of single board members may be excluded where such a board member expressed his dissenting opinion at the latest immediately after he learnt about the decision. The liability may be stricter where the board or single board members receive a salary from the cooperative.

In cases where non-members or non-user members, mainly investors, have a right to sit on the board of directors, one must ensure that they are neither able to take decisions on their own, nor that they constitute a blocking minority.

5.3.3 Powers

The list of powers/obligations 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/obligation to:

¹⁷⁹ See Münkner, “Cooperative Law as an Instrument of State Sponsorship of Cooperative Societies”.

- represent the cooperative in all acts of civil life and to administer and manage the cooperative. This power is limited by the legal capacity of the cooperative¹⁸⁰ and the decisions taken by the general assembly. 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. The law might have to clarify whether such restrictions have an effect on third parties or whether they are limited to the relationships internal to the cooperative
- keep the registers and books of the cooperative and the minutes of its own meetings
- 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
- verify that the audit is conducted regularly and within the prescribed time limits before discussing the conclusions with the supervisory council, if any, and/or the general assembly
- facilitate the work of the auditors
- convene the ordinary and extraordinary general assemblies and prepare their agenda according to the bylaws/statutes
- prepare the management report (including an activity plan for the following year) and the annual budget
- admit, exclude or suspend members, possibly provisionally, pending respective adjustments by the general assembly
- co-opt in the case of a vacancy new members unless this power is explicitly given to the general assembly or the supervisory council, if any
- facilitate the exercise of the rights of the members and make certain that they assume their obligations
- nominate, if necessary, a manager or director, member or not of the cooperative, and ensure that the manager or director carries out the assigned duties correctly. In practice, this employee must assume the management functions which are not explicitly reserved to be performed by the board. He may employ and direct the necessary number of personnel. Where the work of the board of directors requires making use of his professional knowledge or know-how, the manager may be integrated into the board of directors as a member, with or without voting rights, depending on whether he is a member of the cooperative or not or on whether the bylaws/statutes provide for this
- file, if necessary, an application for the opening of bankruptcy procedures

¹⁸⁰ See Part 3, Section 3.1, Registration.

- make certain that its functioning be transparent by adopting internal regulations, unless these are drawn up by the general assembly
- assume several and joint responsibility/liability in case of wrongdoings and finally
- take on any other right or obligation, assigned by the general assembly or contained in the bylaws/statutes.

5.4 Supervisory council

5.4.1 Composition

Where the law provides for the obligatory or voluntary establishment of a supervisory council, this supervisory council carries out the control function in the interest of the members. Consequently, it is exclusively composed of members of the cooperative. It may be described as a permanently sitting mini general assembly. Its establishment can be seen as part of an efficient self-control.

5.4.2 Provisions relating to the supervisory council

Just as for the board of directors, the supervisory council must be regulated by a certain number of provisions, in particular on:

- the eligibility criteria and the prohibition to sit at the same time on the board of directors of the current year or have sat on the board of directors of a financial year which may be subject to control by the supervisory council. The presence of several members of a same family (to be defined) in one or several organs/ bodies must be avoided (see above)
- the qualifications of the members of the supervisory council. In order to be able to effectively control the board of directors and the management, if any, the members of the supervisory council must have the necessary time and skills
- the duration of the mandate
- the quorum and the mode of voting and
- the financial liability.

5.4.3 Powers

The supervisory council's principal task is to control the activities of the board of directors, of the management, if any, and those of any commission. In order to be able to carry out this task, it will have access to all information at all times. Since it is only answerable to the general assembly, it may only take orders from that organ/body.

Besides these broad rights it can have a number of particular ones. For example, should the board of directors fail to properly convene a general assembly, the supervisory council could do so and it might elect the members of the board of

directors in cases where they are not elected by the general assembly or in the case of a vacancy, if it is impossible for the general assembly to take a rapid decision, subject to confirmation by the latter.

6. CAPITAL FORMATION AND DISTRIBUTION OF ASSETS

6.1 Financial resources¹⁸¹

6.1.1 Principles

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

Growing competition put cooperatives in a difficult situation in many a country. Today's economies are global, giving a competitive advantage to those who can easily access capital with which to participate in the lead production, which is the production of knowledge, and/or to acquire knowledge as a means of production. But even in less capital-intensive sectors cooperatives find it difficult to constitute the necessary financing of their activities. Their capital varies with the number of members. As a rule, cooperative members have limited financial or other resources. As additional contributions do not increase the voting power of the contributor, and as interest payments are limited, members are generally not inclined to invest more than their obligatory share; and even less are non-members inclined to do so.

The difficulties in raising a sufficient amount of capital are seen by many as the principal drawback of cooperatives. If governments want to avoid cooperatives being restricted to low productivity and easy to imitate activities, they must see to it that the inherent weak capital base of cooperatives be raised to a level where they may withstand the harsh winds of national, regional, international and indeed global competition. Especially in industrialized countries, legislators have therefore opened the way to a capital formation similar to that of stock companies, putting, however, the cooperative identity at risk.¹⁸² While it is important to make better use of the comparative/competitive advantages of cooperatives and to find new and cooperative-adequate financing instruments in order to allow cooperatives to participate in competitive markets, it is also important to underline that by definition the financing possibilities of cooperatives cannot match those of capital-centred companies.

The autonomy of cooperatives flows mainly from a system of carefully balanced internal and external financing, the latter for example through non-member business,

¹⁸¹ For the various financing instruments, see Boletín de la Asociación Internacional de Derecho Cooperativo, 1996, 2001, 2003 and The World of Cooperative Enterprise, 1996.

¹⁸² See Part 1, Section 2, The evolution of cooperative law: from the distinction of enterprise types to their isomorphization.

non-patronizing member investments, non-member investments. The conflict between user interests and investor interests, which is to be avoided by the cooperative model, is likely to emerge through any such external financing mechanism.

6.1.2 Internal financial resources

6.1.2.1 Member shares

The member shares do not constitute a gainful investment. The paid-up shares constitute 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/s.

Shares are nominative, indivisible, non-transferable (unless decided otherwise by the general assembly), not attachable and non-negotiable.

In primary cooperatives the amount of capital held by one member must be limited so that the principle of equality of the members in real terms is not endangered. When this balance becomes disturbed through the termination of a membership, the cooperative must redistribute the shares.

In order to rebalance the relationship between the overall economic situation and the nominal value of the shares, cooperatives should be allowed to revalue their shares under the strict supervision of the competent authorities.

As said, the shares may be contributed in cash or by leaving a part of the surplus to which a member is entitled with the cooperative, in kind (by transfer of title, if any), as work/industry or as service.

The criteria for their valuation need to be laid down, as well as the designation of those empowered to evaluate.

6.1.2.2 Additional member shares

A means to improve the internal financing and to increase the creditworthiness of cooperatives, i.e. their ability to take out loans, is the issuing of additional member shares. It may be advantageous to encourage members to subscribe to additional or supplementary shares. These may be conceived in such a way as to not entail an additional financial liability, as to grant the right to fixed interest payments, as to be reimbursable upon request, and/or as to grant a right of participation in the reserves upon withdrawal from membership, even where the reserves are otherwise indivisible.

6.1.2.3 Minimum share capital

Another means to improve liability and creditworthiness is to 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 closer to the financial structure of capitalist enterprises.

6.1.2.4 Legal reserve fund

On the contrary, incentives to constitute a reserve fund are a support to a genuinely cooperative way of overcoming at least partly and over time the inherent financing weakness. The reserve fund cushions against a lack of liquidity and against the loss of value of the obligatory shares. It protects third party interests in the same way as does a minimum capital requirement. The reserve fund must not sit idle, but be used. It must be obligatory. If indivisible, at least until involuntary liquidation, such a fund assures minimum stability and limits the risk of voluntary liquidation driven by speculation. This locked-in capital serves also as an inter-generational link, an element of sustainability.¹⁸³

The legal reserve fund is supplied by:

- transferring the totality of the profit gained on transactions with non-member users
- transferring a minimum percentage of the surplus gained on transactions with the members until the fund reaches a certain amount, generally at least an amount equivalent to the share capital. Not subjecting these monies to income taxation will incentivize the establishment of such (indivisible) reserves. This special tax treatment might be justified by third party and public interests, because of the specific capital structure of cooperatives which does not allow them easy access to the financial market. This is an example of the importance of conceiving the notion of cooperative law in its widest sense. This should at least apply as far as the reserve fund is indivisible and
- transferring income from activities not related to the objective of the cooperative, such as the sale of fixed assets.

Furthermore, the legislator should encourage the establishment of education, training, social or any other funds. The designated use of these funds should be made compulsory.

6.1.2.5 Cooperative groups

Some cooperatives have been experimenting successfully with setting up so-called cooperative groups, i.e. daughter companies in the form of capitalistic companies which can access the financial market. As long as this scheme serves the interests of the members and these stay in control of the operations of these groups, this might be one way to cope with increased capitalization requirements, especially for high value-adding activities.

¹⁸³ See above Part 1, Section 3, The viability of cooperatives in a global economy and legal policy issues.

6.1.3 External financial resources

Debentures and negotiable subordinated bonds have been allowed by a number of legislations for quite some time already. Provided some rather technical precautions are taken and the amount of external investment does not create a factual dependence of the cooperative on that capital, these do not influence the members' autonomy since no voting and/or participatory rights are attached to them.

Another way of attracting external financing is the issuing of transferable investment certificates for members (internal) and non-members along with the right to participate in the distribution of profits and surplus and in the distribution of the assets in case of liquidation. Where these certificates do not grant any decision-making power or, in the case of members, any additional decision-making power, they might represent a still acceptable case of deviation from cooperative principles. Where, however, these certificates do grant voting rights, even to a limited extent only, member control is at risk.

As said, when it comes to external financing, the distinctive features of cooperatives are easily at risk. Ideally, cooperative members are the sole “investors” and users (cooperative principle of identity). Non-user members and non-member users have been accepted as “deviations” from the identity principle. The admission of investment members and non-member investors is a further step away from this identity principle. Where, as some legislations provide for, cooperative shares may be traded at the stock exchange and members' shares have a symbolic value only, capital holders become anonymous and the (capital) structure of the cooperatives may no longer be distinguished from that of stock companies. In addition to violating the identity principle, these developments put the cooperative principle of the promotion of the members at risk.

6.1.4 Transactions with non-member users

In a way transactions with non-members can be considered as external financing. By definition so-called closed cooperatives do not transact with non-member users. Often cooperatives whose members are related through additional/special bonds, for example in savings and credit cooperatives founded within an enterprise or a district, tend to exclude non-member user transactions. Beyond that, and depending on its objectives and situation, each cooperative must decide whether it wants to offer its services to non-members as well.

If non-member user transactions are permitted, it is important not to let them jeopardize the autonomy and independence of the cooperative. As already mentioned, the volume of transactions with non-members must consequently be limited. This might be done by fixing a percentage of the total turnover, above which no transactions may be made with non-member users. It might also be important to avoid the situation where non-member users get into a monopolistic or monopsonistic position vis-à-vis the cooperative.

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-member users.

6.2 Surplus distribution

As already mentioned, it is important to distinguish between profit and surplus. By definition, cooperatives ought to calculate the prices for transactions with their members near costs.¹⁸⁴ In order to cover market related risks, a margin must be included which will, however, be returned to the members at the end of the financial year, should the risk not have materialized, and should the balance sheet show a surplus. If paid to the members, this distribution in form of patronage refunds, calculated pro rata of the transactions with the cooperative, thus constitutes a deferred price adjustment; in terms of taxation a cost factor. Therefore, instead of speaking of “profit” in this connection, one should speak of temporary surpluses. The consequences for income taxation are obvious: where there is no profit, such “profit” may not be taxed.

Two modes of calculating the surplus are possible: deduction of the overhead costs per transaction, i.e. individualized, or deduction of the total amount of overhead costs from the total surplus. The choice will also depend on the type of cooperative.

The surplus will be distributed in the following manner:

- transfer to the legal reserve fund
- transfer to the statutory funds, if any
- limited interest payments on the paid-up shares at a rate not higher than that paid by commercial banks for certain kinds of deposits and on investments, if any
- patronage refunds to the members calculated pro rata of their transactions with the cooperative and, possibly
- premium payments to employees.

Any payment to members is conditioned by them having fulfilled their obligations, especially the obligation to pay up their shares.

6.3 Reimbursement of capital

In the case of resignation/withdrawal 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 are seriously threatened by an

¹⁸⁴ The term “near cost” is used here in a different way than in economics in general. As mentioned, it only excludes the profit margin from the cost calculation, but it includes the costs for investments etc.

immediate reimbursement or where it would lead to violating a minimum capital requirement (if any), it may, as mentioned already, be withheld, but for a reasonable period of time only.

As a rule, the same type of reimbursement of shares applies in the case of liquidation. The remaining monies after liquidation are transferred to the cooperative movement, to a charity or public interest 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, whereby seniority of membership might be considered as an additional criterion.

7. AUDIT

The implementation of a system of internal and external, timely, regular and cooperative specific audit of the financial, management, social and societal standing of the cooperatives by qualified and independent auditors, combined with advice on how to improve management and administration, is a condition sine qua non for the sound development of cooperatives.

The purpose of the audit is manifold. It is a periodical check as to whether everyone respects the rules of the game. It is a control of whether the attribution of the legal person status continues to be justified. It helps to monitor whether the interests of third parties, managers and members have been respected.

The internal audit will be carried out on an on-going basis by a group of members. Their number, the duration of their mandate, the required qualifications, powers, duties and salary must be specified by the general assembly. Their civil and penal responsibility might be emphasized in the resolution of the general assembly. Internal auditors may not be or have been members of a cooperative organ/body which is or may be subject to their control. The incompatibility criteria which apply to board members apply.

The external audit will be carried out by a higher-level cooperative organization or by private, preferably chartered, auditors. If the cooperative movement is not yet able to provide this service and if private services are not available or affordable, a public authority may temporarily audit cooperatives. In no case must an administrative unit in charge of the promotion or the registration of cooperatives audit cooperatives. A public authority might exercise the power to audit permanently, if its independence from government interference is guaranteed.

The specificity of cooperatives requires the auditor to make additional investigations beyond what is being done in other enterprise types. They are to ensure that cooperatives comply with their task of promoting their members. Where economic

developments require a management system of cooperatives that does not allow for direct participation of the membership, it becomes ever more important to provide for transparency of the management in order to preserve the democratic nature of the cooperatives.

The fact that the objectives of cooperators differ from the purely financial interests of company stockholders must especially be taken into account.

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 members set, were reached or at least furthered, and that the decisions of the management were taken in conformity thereto (management audit in order to establish a social balance alongside the financial or economic one). 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. Generally speaking, the auditor must have access to all material, premises and persons able to inform him about the operations of the cooperative. The external auditor will also have access to the findings of the internal auditors.

The auditors should not limit their activity to that of an ex post control, but they should also give advice on how to improve the management and administration of the cooperative. The potential conflict between the monitoring and the promotional role has not led to significant problems in countries where such audit has been performed for years.

Whereas internal audit is to be performed on an on-going basis, the frequency of the external audit might vary with the volume of the turnover, the kind of activities, the size of the capital, the volume of non-member business or other criteria, similar to those which define simplified cooperative structures¹⁸⁵

The auditor's report is to be submitted to the board of directors and to the supervisory council, if any, where the board of directors failed to do so, with a view to them explaining it to the general assembly. It must be made available for inspection by the members. The auditors must have the right to speak at the general assembly and, should the board of directors or the supervisory council not have convened the general assembly, or not have (sufficiently) explained the contents of the auditor's report, the auditors have the right to do so.

The conclusions drawn from the audit must be communicated to the competent authority.

¹⁸⁵ See Part 3, Section 9, Simplified cooperative structures.

The establishment of an effective, impartial audit system, staffed with qualified cooperative auditors, whose services will be accessible by all cooperatives, should be made an obligation. An audit fund might be created for this purpose.

8. DISSOLUTION

8.1 Dissolution without liquidation: amalgamation, scission and conversion

8.1.1 Principles

The autonomy of cooperative members permits them to dissolve their cooperative 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 quorum and 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 opposed to the dissolution must have the right to resign.

8.1.2 Amalgamation

There are two types of amalgamation:

1. One or several cooperatives are absorbed by another one. This is at times difficult psychologically for the members of the absorbed cooperatives.
2. A new cooperative is born by merging two or more cooperatives. In this case, new bylaws/statutes will have to be adopted.

Often, expectations as to the economic effects (rationalization of management and administration, economies of scale, etc.) are not met and/or identification of the members with the new entity fails, entailing demotivation and difficulties in decision-making. Before deciding to amalgamate, the cooperatives should therefore consider integrating horizontally.¹⁸⁶

8.1.3 Scission

A cooperative may split into two or more cooperatives. Members, assets and debts have to be split, including the reserve fund.

8.1.4 Conversion

Only those cooperatives that have a divisible legal reserve fund may convert into another form of business, within the limits of the provisions relating to the new

¹⁸⁶ See Part 3, section 10, Horizontal and vertical integration.

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. The reserve fund will, however, not form part of the capital of the new organization.

Where the law allows cooperatives with an indivisible reserve fund to convert, the reserve fund must be declared divisible by the general assembly when deciding the conversion. Where surplus monies transferred to the reserve fund were not taxed, complicated issues of taxation might arise. Besides, the legitimacy of such a decision might be questionable where the indivisible reserve fund had not been built up by those deciding on its divisibility.

8.2 Dissolution with liquidation

In the case of dissolution with liquidation, too, the decision may freely be taken by the members. A special quorum and a qualified majority are, however, required due to the importance of the decision. Several legislations require that at least two consecutive general assemblies be held to decide on the question.

The dissolution may also be decided by an authority *ex officio* or upon request by an interested person, for example when the cooperative has repeatedly violated laws, regulations and/or its own bylaws/statutes. Such a decision might also have to be taken when the general assembly failed to decide on the dissolution, despite the fact that:

- the duration of the cooperative, laid down in the bylaws/statutes, 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 for a specified period of time
- 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 is insufficient, it will be necessary to include provisions in the cooperative law
- the cooperative has not had any activity for a given period of time or
- there is any other reason, to be specified by law in order to avoid arbitrariness.

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 or the attribution of liabilities etc., to the publication of the deletion of the cooperative from the register, must be regulated. The time period for the liquidation process to be finalized should be limited

in order for the cancellation of the liquidated cooperative from the register to establish clarity as soon as possible.

In principle funds remaining after liquidation should be transferred to a cooperative or charitable organization or to a public institution (indivisibility of the reserve fund, locked-in capital). This is especially justified where transfers to the reserve fund were not taxed and/or to prevent speculative behaviour.

9. SIMPLIFIED COOPERATIVE STRUCTURES

In order to favour the rapid development of cooperatives as part of overall public development programmes, many legislations provided in the past for the possibility of provisional registration of mainly “pre-cooperatives”. After decades of experience one must, however, admit that most of these pre-cooperatives, often preferred because of their light structure and their exemption from a number of constraints, have not evolved towards autonomous cooperatives. On the contrary, their dependence on external support increased with the intention of turning them into cooperatives. The control which had to follow this support has discredited government as a promoter of cooperatives in many a country. In addition, provisional registration was a source of considerable confusion, especially among banks and other business partners with whom it was supposed to facilitate relations, because the legal nature of a provisional registration remained unclear.

This does not mean that provisions for a less complex form of organization than cooperatives were not necessary. The French “Groupement d’Intérêt Economique (GIE)” and the Cameroonian common initiative groups may serve as models of how this need can be accommodated.¹⁸⁷ Unlike 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 (membership) 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/bodies, number of members of the organs/bodies, documents to be kept etc.). Such structures might not need, for example, a supervisory council, a full-time manager, an elaborate accounting system or a chartered accountant as an auditor.

¹⁸⁷ The French Groupement d’Intérêt Economique (GIE) dates from 1967, respective legislations from 1984 and 1985. The 1992 Cooperatives Act of Cameroon introduced the “common initiative groups”. See also the 1982 Cooperative Act of South Africa, the 1997 Italian cooperative law (“small cooperatives”), the 1999 Cooperative Law of Burkina Faso (“groupements”), the 1999 Cooperative law of Madagascar (“groupements à vocation économique”) and the 2000 Cooperative Law of Mali. A number of general cooperative laws (Austria, Belgium, Finland, France, Germany) exempt “small” cooperatives from certain requirements or under certain circumstances.

This concept of simplified cooperative structures is gradually replacing that of “pre-cooperatives”.¹⁸⁸ Some countries do discuss in this context the appropriateness of having separate legislation for so-called new (-generation) small cooperatives. There is an interesting parallel in legal history: in the past, legislation on companies with limited liability, like the German GmbH,¹⁸⁹ was introduced because stock companies proved to be organizations too complex for many entrepreneurs.

10. HORIZONTAL AND VERTICAL INTEGRATION

Freedom of association includes the right of cooperatives to integrate horizontally and vertically to form unions, federations and/or confederations. The latter are sometimes called apex organizations or bring together multi-sectoral unions, federations, or even confederations, especially when representing a specific economic sector.

Joining forces horizontally or vertically is to avoid concentration and is a way to preserve the autonomy and independence of the individual cooperatives, whilst creating the advantages of economies of scale.

Concerning vertical integration, the number of tiers should be decided by the cooperatives, keeping in mind the cost/benefit relation of the structures. The state should refrain from any intervention, except monitoring these organizations’ compliance with their obligation to support and represent their members. Especially, cooperatives should not be forced to integrate on the lines of administrative subdivisions or on the lines of activities if they freely choose otherwise. In order to establish a system of partnership between the state and cooperatives, the state should promote an independent and competent cooperative movement.

The cooperative law must define the legal form of the different levels and specify the activities which each level should exercise. The rights and obligations of the higher-level cooperative organizations include:

- representation of the members at national, regional and international level
- promotion, education and training
- advice, financial, insurance and economic services (marketing, supplies, exports, imports, etc.)
- development of inter-cooperative relations
- research and development
- arbitration
- control and audit, and finally
- dissemination of the cooperative law.

¹⁸⁸ For the latter, see Münkner, *The Legal Status of Pre-cooperatives*.

¹⁸⁹ Gesellschaft mit beschränkter Haftung (limited liability company).

The very idea of the vertical structures defines also their functions as being subsidiary to those of their members, i.e. the activities of the higher-level cooperatives should complement those of their affiliates. The vertical structure is visualized by the form of a pyramid where all levels must serve the interests of the members at the very base (see ILO R. 193, Paragraph 6.(d)). The mechanism to ensure this service consists in building and especially in financing the pyramid from the bottom.

11. DISPUTE SETTLEMENT

Disputes within the cooperative movement, i.e. disputes involving exclusively members, the organs/bodies of the cooperatives, the cooperatives themselves or their higher-level organizations, should be subject to reconciliation, mediation and/or general or special arbitration procedures before the parties may access a general or a special court of law.

Because of the importance of good personal relations for the success of cooperatives, most legislations therefore provide for the obligation to resort to such out-of-court procedures before submitting a dispute to a court of law. This is stipulated either by law or through the bylaws/statutes of the cooperatives.

Generally, the parties prefer these procedures to official ones because they are cheaper, more expedient and also because they allow 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 dispute settlement.

The rule of law does not allow for any obligation to submit disputes to government authorities for final solution. In no case may access to court as a last remedy be prohibited.

12. MISCELLANEOUS

12.1 Government decrees of application

As said,¹⁹⁰ the statutory powers of the government must be limited to setting rules for the application of the law only. Special attention must be paid to an adequate relationship between the law and government instruments. Not only do these instruments tend to exceed their function to make the law operational, but they are also being used to circumvent the rigidities of the law in a situation which requires flexibility and quick adjustment to the necessities of development. Together, the law and the decree of application must leave the necessary space for the cooperatives to be able to express their autonomy through their bylaws/statutes.

¹⁹⁰ See Part 2, Section 4.4.3, Choice of the adequate legal instrument.

Each section of the government decree should state that clause of the law on which it is based.

The law must also provide for a time limit for passing government decrees, especially where the coming into force of the law itself depends on the passing of such a decree, as is the case in many countries with a French legal tradition.

12.2 Sanctions

The cooperative law must establish a list of acts liable to penal sanctions, indicating the articles of the penal code. This is also to exclude any practice whereby cooperatives deal with certain acts in the bylaws/statutes as if they constituted a criminal offence. Cooperatives may stipulate sanctions in the bylaws/statutes or in individual contracts. The daily functioning of cooperatives is also guaranteed by the possibility of dismissing members, members of the board of directors or of the supervisory council, if any.

12.3 Repeals, transition

As in any law, the repeal of former laws might have to be regulated, as also the period of transition during which all concerned must make necessary arrangements to comply with the new law.

Part 4: Cooperative lawmaking

1. LEGISLATIVE PROCEDURE

Lawmaking requires identifying the real lawmakers in today's global world where the notion of law is changing radically and where lawmaking is shifting rapidly¹⁹¹ and it requires taking into account a wide notion of law (see Box 2). Furthermore, the difference between legislating for member-based entities, like cooperatives, and that for other entities must be considered.

Since the very idea of cooperation is based on participation, it is suggested that we adopt a participatory approach to cooperative lawmaking. This method constitutes the organic link between the generation, dissemination and implementation of the law. The right to participate in the definition and design of law, the right to share ideas of justice to create legal structures, and the right to use law to change law are human rights.¹⁹² In cooperative lawmaking these rights are not limited to cooperators. Any law has to reconcile general interests with the particular interests of specific stakeholders.

This participatory approach must be embedded in the procedures laid down in the respective national constitution in order to ensure that the text fits into the legal system and is respected by non-cooperators as well.

¹⁹¹ The following are just observations which need more reflection. Nowadays, in addition to profoundly changing production patterns, globalization is also disrupting the notions of law and the processes of making law. The technological innovations of recent decades have been implying a reorientation within new time frames and a spatial reorganization of social life with considerable effects on law. While in the past, the conditions of time and space engendered a multitude of geographically separated internormativities, globalization makes us experience today the "interculture". It entails an ever more frequent and intensive intermixing of radically different cultures and, hence, differing internormativities where the position of law needs constant verification. The spatial reorganization of social life through technological changes has not only affected the law, but also lawmaking and the sources of law. The state, which lawyers continue to consider the main guardian of law, has become too small an entity for global actors, and too big to manage the intercultural. (See Koizumi; Ost, p.15; Villeneuve.) National, international, supranational and transnational levels intermix and meet a growing body of standards set by private entities, which have their distinct ways of making rules and enforcing them. A clear distinction between these different rules is no longer possible. (See Bogdandy, "Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz"; idem, "Democrazia, globalizzazione e il futuro del diritto internazionale"; Herce: "...dichas empresas gloables dominan el panorama corporativo mundial". Laws in the material sense are becoming global. This trend was already discernible in the 1950s. (See for example Jessup and Schnorr. See also Henry, "Zur Ent-Rechtlichung sozialer Beziehungen. Das Beispiel der Bodenrechtsgesetzgebungen in Afrika südlich der Sahara: 20 Thesen", Point 15.)

Other examples which directly affect cooperative legislation are, as said, the quasi standard-setting by the International Accounting Standards Board (IASB), the Financial Accounting Standards Board (FASB) and the Basel Committee on Banking Supervision, as well as the rules of the financial market to which the globalization of the capital intensive production of knowledge subjects producers and which itself, because of its globality, escapes the reach of state law. To be noted in this context is the transformation of stock exchanges in the form of associations into stock companies.

In addition, lawmaking is shifting in multi-faceted and complex processes from parliaments to governments, from governments to courts (for the latter, see Israel) and from national to regional, inter- and transnational levels. As for a growing concern related to undemocratically legitimized lawmaking, see "Gemeinwohl demontage". Another phenomenon is the "outsourcing" of the elaboration of laws by ministries and parliaments to private law firms (see Jahn).

¹⁹² See Paul; Dias. See also Part 1, Section 3, The viability of cooperatives in the global economy and legal policy issues.

2. IMPLEMENTATION OF THE LAW

The cooperative law, by and of itself, does not change anything. In order for an effective and efficient cooperative movement to emerge and/or to thrive, the law must be applied. In order to be applied the law must be understood. It is known that in a good many countries the official language and, particularly, the legal vocabulary, are not mastered by the addressees of the law, who are often even illiterate. Although not insinuating that the difficulties related to the implementation of the law are limited to language issues, one understands that maximum attention must be focused on the dissemination of the cooperative law. This task rests as much with the government as with the cooperative movement.¹⁹³

Some countries have laypersons' guides in the main vernacular languages and organize nationwide popularization campaigns. In a similar move, higher-level cooperative organizations have produced guides to or commented versions of the legislation, and the internet is increasingly being used to popularize and explain the legal provisions. For the rest the successful implementation of the law depends mainly on an adequate institutional back-up, like efficient registration, audit, prudential/monitoring and promotional services with the necessary financial means and qualified manpower.

3. INTERNATIONAL DIMENSION OF COOPERATIVE LEGISLATION

ILO R. 193, Paragraph 18. (d) suggests that "International cooperation should be facilitated through: [...] developing, where it is warranted and possible, and in consultation with cooperatives, employers' and workers' organizations concerned, common regional and international guidelines and legislation to support cooperatives". Globalization and an adequate assessment of the comparative advantages and disadvantages of enterprise types are facilitated by the harmonization of cooperative laws. Harmonization requires cross-border comparison, not only of the existing legal rules, but also of the principles underlying them.¹⁹⁴ Also national and regional law reforms require comparing, as lawmakers may not experiment and hence must rely on foreign experience. It is however essential to avoid past mistakes which consisted often in unreflected transfers of legal know-how. More than before, the art of the legislators will consist in harmonizing laws without confusing laws with law and without confusing law with Law.¹⁹⁵

The search for cooperative laws which better reflect the cultural diversity within countries and across borders is a challenge. It is a delicate task because it could be understood as going against globalization and it could run the risk of causing cooperative movements to disintegrate by giving away too many of their common features. But, the choice is not between a unitary system and cultural diversity. The choice is cultural diversity in human unity.

¹⁹³ See also Part 2, Section 4.4.5, Language of the cooperative law.

¹⁹⁴ As for ways to harmonize see Henry, "Basics and New Features of Cooperative Law - The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws".

¹⁹⁵ For this distinction, see as early as Montesquieu, *Première Partie, Chapitre I, 3.*

Conclusion

The shift to conceptualizing cooperatives as private enterprises of a specific type which people choose as a form to organize their activities, rather than which people are forced to “choose” because it is the only available type of enterprise, faces two major challenges, a political one and a legal one. The political one consists in effectively “banning” the past instrumentalization of cooperatives. Numerous are those who continue suggesting the formation and/or promotion of cooperatives as a panacea. Numerous are those who would like this panacea to be applied only when crises hit, when governments do not care for social justice or, in a more modern context, when the economy is not green enough, or when badly conceived privatizations of public services leave a growing number of people without access to basic utility services, health care, education, etc. The legal one consists in dealing with the fading distinctiveness of cooperatives in legislation. The reversal of this trend requires policy choices for which scientific advice is not readily available. Cooperative research, in general, and comparative research on cooperative law, in particular, do not rank high on the research and education agendas.

Hagen Henry

ANNEX 1: International Co-operative Alliance Statement on the Co-operative Identity

Definition

A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.

Values

Co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others.

Principles

The co-operative principles are guidelines by which co-operatives put their values into practice.

1st Principle: Voluntary and Open Membership

Co-operatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

2nd Principle: Democratic Member Control

Co-operatives are democratic organizations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary cooperatives members have equal voting rights (one member, one vote) and cooperatives at other levels are also organized in a democratic manner.

3rd Principle: Member Economic Participation

Members contribute equitably to, and democratically control, the capital of their cooperative. At least part of that capital is usually the common property of the cooperative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.

4th Principle: Autonomy and Independence

Co-operatives are autonomous, self-help organizations controlled by their members. If they enter to agreements with other organizations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

5th Principle: Education, Training and Information

Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives. They inform the general public – particularly young people and opinion leaders - about the nature and benefits of co-operation.

6th Principle: Co-operation among Co-operatives

Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.

7th Principle: Concern for Community

Co-operatives work for the sustainable development of their communities through policies approved by their members.

Adopted in Manchester (UK), 23 September 1995

ANNEX 2: 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives

A/56/73
E/2001/68

Annex

Draft guidelines aimed at creating a supportive environment for the development of cooperatives

Objectives

1. Within the General Assembly and the Economic and Social Council, and at major recent international conferences, Governments have acknowledged the significance of cooperatives as associations and enterprises through which citizens can effectively improve their lives while contributing to the economic, social, cultural and political advancement of their community and nation. They have recognized the cooperative movement as a distinct and major stakeholder in both national and international affairs.

2. Governments recognize that the cooperative movement is highly democratic, locally autonomous but internationally integrated, and a form of organization of associations and enterprises whereby citizens themselves rely on self-help and their own responsibility to meet goals that include not only economic but social and environmental objectives, such as overcoming poverty, securing productive employment and encouraging social integration.

3. Consequently, Governments seek to create an environment in which cooperatives can participate on an equal footing with other forms of enterprise and develop an effective partnership to achieve their respective goals. Policies should protect and advance the potential of cooperatives to help members achieve their individual goals and, by so doing, to contribute to society's broader aspirations.

4. However, such policies can be effective only if they take into account the special character of cooperatives and the cooperative movement, which differs significantly from that of associations and enterprises that are not organized according to cooperative values and principles.

5. The objective of the present guidelines is to provide advice to Governments and set out broad principles on which national cooperative policy might best be based, recognizing that more specific and detailed national policies fall within the responsibility of each Government. Because of the governmental expectations regarding the cooperative movement and the rapidly changing global conditions and changes in

the cooperative movement itself, many policies in most of the Member States of the United Nations might benefit from review, and in some cases from substantial revision.

Policy regarding cooperatives and the cooperative movement

6. The objective of the policy is to enable recognition of cooperatives as legal entities and to assure them and all organizations and institutions set up by the cooperative movement real equality with other associations and entities. In order to ensure equality, the special values and principles of cooperatives must receive full recognition as being desirable and beneficial to society and that appropriate measures are taken to ensure that their special qualities and practices are not the cause of discrimination and disadvantage of any kind.

7. To achieve this objective, Governments are concerned with creating, and with maintaining as conditions change, an enabling environment for cooperative development. As part of such an environment, an effective partnership between Governments and the cooperative movement could be sought.

Public recognition

8. It is appropriate and useful for Governments to acknowledge publicly the special contribution, in both quantitative and qualitative terms, made by the cooperative movement to the national economy and society. The joint observance of the observance of the International Day of Cooperatives and the International Cooperative Day organized by the International Cooperative Alliance, pursuant to General Assembly resolutions 47/90, 49/155 and 51/58, may provide an occasion on which information on the cooperative movement is publicly disseminated.

Legal, judicial and administrative provisions

9. Appropriate provision is necessary within legal, judicial and administrative practice if cooperatives are

to contribute positively to improving the lives of their members and the communities in which they operate. Legal provisions may take various forms appropriate to individual national legal systems. The status, rights and responsibilities of cooperatives, the cooperative movement in general, and, if appropriate special categories of cooperatives or distinct aspects of cooperation should be addressed.

10. National constitutions: The legitimacy of cooperatives and the cooperative movement could be acknowledged in these instruments, if appropriate. Provisions that limit the establishment and operations of cooperatives should be appropriately amended.

11. General law on cooperatives or the general section of a single law on cooperatives: A general law on cooperatives or laws specific to cooperatives or under which cooperatives fall should ensure that cooperatives enjoy real equality with other types of associations and enterprises and not be discriminated against because of their special character. Laws should include the following basic set of acknowledgements, definitions and provisions: acknowledgement that the organization of associations and enterprises on the basis of cooperative values and principles is legitimate; acknowledgement of the utility of the cooperative approach to association and enterprise, its contribution to national life and the status of the cooperative movement as a significant stakeholder within society; definition of cooperatives, using the "Statement on the cooperative identity", adopted by the International Cooperative Alliance in 1995; recognition of the unique nature of the values and principles of cooperation, and hence the need for their separate and distinct treatment in law and practice; commitment that neither their unique nature nor their separate and distinct treatment in law and practice should be the cause of discrimination, intended or not; undertaking that no law or practice should restrict the rights of citizens to full participation in the cooperative movement in any capacity consistent with its values and principles and should not restrict the operation of that movement; provision that a general law apply to all categories of cooperatives but that, in order to respond to the situation of certain categories of cooperatives, special laws might be enacted, consistent with the general law; stipulation that all judicial and administrative regulations and practices be based only on the general or special laws on cooperatives; that all regulations clearly identify the provision of the law on

which they are based and the purpose for which they are made; recognition of the full autonomy and capacity for self-regulation of the cooperative movement; acknowledgement that intervention by Governments in the internal affairs of the movement should be strictly limited to measures applied generally to all associations and enterprises equally in order to ensure their conformity with the law. Adjustments may be made only to ensure: real equality in treatment; definition of the responsibilities of the cooperative movement for self-regulation in all matters distinctive to it; provision that the texts of laws and regulations be made available to all cooperative members and employees; provision that representatives of the cooperative movement participate fully in drafting special laws or judicial or administrative regulations and guidelines concerning practice; provision for the maintenance of a public register of cooperatives as a part of procedures for registration of all associations and enterprises; provision for procedures for continuous monitoring and regular review of law and practice which would include the full and equal participation of representatives of the cooperative movement and for encouragement of research on the effect of law and practice on the environment for cooperatives; establishment of the responsibility of Governments to formulate and carry out a policy in respect to cooperatives that would seek to establish a supportive and enabling environment while avoiding any infringement of the autonomy of the movement and any diminution of its capacity for responsible self-regulation and would seek also to engage in an effective and equal partnership with the movement in all matters where it is able to contribute significantly to the formulation and carrying out of public policy; recognition of the value of governmental support for the international cooperative movement, including through intergovernmental activities; and definition of the responsibilities of the cooperative movement as a major stakeholder in society, to the extent these responsibilities are consistent with its full autonomy.

12. Special laws on certain categories of cooperatives: Consistent with the basic provisions of general cooperative legislation, and recognizing the distinctive nature of the business of some cooperatives, it may be appropriate to make special provisions in law for certain types of categories of cooperatives to safeguard their ability to enjoy real equality with other types of associations and enterprises and not be discriminated against because of their special character.

13. **Judicial and administrative practice concerned explicitly with cooperatives:** These must be consistent with the general law on cooperatives and, specifically, with its provisions concerning such practice.

14. **Other laws and practices that may have an effect on cooperatives:** Governments should seek to exclude or eliminate provisions of any law that discriminate against, or are specifically prejudicial to cooperatives. Governments should create an environment that enables cooperatives to identify and communicate cases needing revision.

15. **Monitoring, review and revision of laws and judicial and administrative practices:** This is necessary to ensure that the impact of laws and judicial and administrative practices on the cooperative movement is entirely positive. If identified, discriminatory provisions should be rendered inoperative as quickly as possible pending enactment of revised laws or the issuance of revised regulations and guidelines concerning practice. This process should have as its purpose the early and complete disengagement by Governments from the internal affairs of cooperatives and the cooperative movement, where this still exists, and full operational realization of the principles that cooperatives, although different, are equal to other business enterprises and civil associations.

16. For these purposes, formal procedures for consultation and collaboration should be set up and should include regular and full participation by the cooperative movement. Advantage may be taken also of the special programmes and guidelines offered by specialized international cooperative organizations and intergovernmental organizations.

Research, statistics and information

17. **Research:** Given the significance of the cooperative movement, it may be appropriate to envisage collaboration between governmental and cooperative movement research on matters relevant to public policy; publication and wide diffusion of research results, including those produced by the international cooperative movement, intergovernmental organizations and the United Nations. Emphasis should be on applied research of immediate utility in improving the efficiency of cooperatives, extending benefits to society and improving partnerships between the cooperative movement and Governments.

18. **Statistics:** Several measures may be undertaken to improve statistics for and about cooperatives in view of integrating statistics on cooperatives in regular programmes of the national statistical service and participate in international efforts to improve cooperative statistics, including the establishment of a uniform set of definitions for use by national statistical services.

19. **Information:** Given that Governments regulate and broadly influence information diffusion, a number of measures may be useful in expanding knowledge of the cooperative movement and overcoming prejudices and misconceptions: extension of technical and financial assistance to an extent equal to that made available to other stakeholders; ensuring that no discrimination exists because of the distinctive nature of cooperatives; equal and non-discriminatory access by the cooperative movement to all public media commensurate with its contribution to national life; use of affirmative action to overcome prejudice and misinformation where the term cooperative is associated with a previous and inappropriate usage; diffusion through public media of material on intergovernmental activities undertaken in partnership with or in support of cooperatives; dissemination of printed and computer-based information prepared by governmental or intergovernmental bodies with the same priority and resources as allocated to information on other stakeholders.

Education

20. Given the important contributions of the cooperative movement to education, a number of enabling measures might be useful including the provision of public funds if they are made available to other forms of enterprise for educational programmes. Governments may also consider the inclusion within the national curricula at all levels of the study of the values principles, history, current and potential contribution of the cooperative movement to national society; and encouragement and support of specialized studies in cooperatives at the tertiary level.

Provision of public funds

21. Financial self-reliance, total responsibility and full independence are vital for an effective cooperative enterprise. The best policy approach is one where cooperatives receive the same treatment as any other form of enterprise. A number of other measures are

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valuable: acknowledgement and protection of the special character of cooperatives and avoidance in law or practice of any discrimination arising from the special financial status, organization and management of cooperatives; avoidance of any direct or indirect engagement in the internal financial affairs of cooperatives or of the cooperative movement and recognition of the full responsibility of the movement for its own financial affairs; and the development of partnerships with cooperative financial institutions in such matters as community and regional development, drawing on their experience of mobilizing and managing capital in a manner and for purposes conducive to the public good.

Institutional arrangements for collaboration and partnership

22. All Government departments and bodies that have contact with the cooperative movement should be aware of, and act consistently with, national policy on cooperatives. In order to ensure consistency, certain coordinating functions within government, as well as liaison with the cooperative movement, will be useful.

23. It is advisable that a single department or office assume central coordinating, focal and liaison functions, of which the following might be most important: elaboration of a single national comprehensive policy in respect of cooperatives, formulation of guidelines for consistent execution throughout government, including monitoring and review of that execution; collaboration with legal departments in drafting the general and any special laws; and liaison, consultation and collaboration with the cooperative movement.

24. The most effective organizational location for the responsible entity would be within a department already charged with broad strategic and coordinating functions, such as the office of a prime minister or president, or that responsible for economic management of development planning.

25. An institutional arrangement which enables regular consultation and effective collaboration between Governments and the cooperative movement would be valuable.

26. Liaison between intergovernmental programmes and the international cooperative movement should be supported.

ANNEX 3: 2002 ILO Recommendation No. 193 on the Promotion of Cooperatives

INTERNATIONAL LABOUR CONFERENCE

Recommendation 193

RECOMMENDATION CONCERNING THE PROMOTION OF COOPERATIVES

The General Conference of the International Labour Organization,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 90th Session on 3 June 2002, and
Recognizing the importance of cooperatives in job creation, mobilizing resources, generating investment and their contribution to the economy, and
Recognizing that cooperatives in their various forms promote the fullest participation in the economic and social development of all people, and
Recognizing that globalization has created new and different pressures, problems, challenges and opportunities for cooperatives, and that stronger forms of human solidarity at national and international levels are required to facilitate a more equitable distribution of the benefits of globalization, and
Noting the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session (1998), and
Noting the rights and principles embodied in international labour Conventions and Recommendations, in particular the Forced Labour Convention, 1930; the Freedom of Association and Protection of the Right to Organise Convention, 1948; the Right to Organise and Collective Bargaining Convention, 1949; the Equal Remuneration Convention, 1951; the Social Security (Minimum Standards) Convention, 1952; the Abolition of Forced Labour Convention, 1957; the Discrimination (Employment and Occupation) Convention, 1958; the Employment Policy Convention, 1964; the Minimum Age Convention, 1973; the Rural Workers' Organisations Convention and Recommendation, 1975; the Human Resources Development Convention and Recommendation, 1975; the Employment Policy (Supplementary Provisions) Recommendation, 1984; the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998; and the Worst Forms of Child Labour Convention, 1999, and
Recalling the principle embodied in the Declaration of Philadelphia that "labour is not a commodity", and
Recalling that the realization of decent work for workers everywhere is a primary objective of the International Labour Organization, and
Having decided upon the adoption of certain proposals with regard to the promotion of cooperatives, which is the fourth item on the agenda of the session, and
Having determined that these proposals shall take the form of a Recommendation;
adopts this twentieth day of June of the year two thousand and two the following Recommendation, which may be cited as the Promotion of Cooperatives Recommendation, 2002.

I. SCOPE, DEFINITION AND OBJECTIVES

1. It is recognized that cooperatives operate in all sectors of the economy. This Recommendation applies to all types and forms of cooperatives.

2. For the purposes of this Recommendation, the term “cooperative” means an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.

3. The promotion and strengthening of the identity of cooperatives should be encouraged on the basis of:

- (a) cooperative values of self-help, self-responsibility, democracy, equality, equity and solidarity; as well as ethical values of honesty, openness, social responsibility and caring for others; and
- (b) cooperative principles as developed by the international cooperative movement and as referred to in the Annex hereto. These principles are: voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; cooperation among cooperatives; and concern for community.

4. Measures should be adopted to promote the potential of cooperatives in all countries, irrespective of their level of development, in order to assist them and their membership to:

- (a) create and develop income-generating activities and sustainable decent employment;
- (b) develop human resource capacities and knowledge of the values, advantages and benefits of the cooperative movement through education and training;
- (c) develop their business potential, including entrepreneurial and managerial capacities;
- (d) strengthen their competitiveness as well as gain access to markets and to institutional finance;
- (e) increase savings and investment;
- (f) improve social and economic well-being, taking into account the need to eliminate all forms of discrimination;
- (g) contribute to sustainable human development; and
- (h) establish and expand a viable and dynamic distinctive sector of the economy, which includes cooperatives, that responds to the social and economic needs of the community.

5. The adoption of special measures should be encouraged to enable cooperatives, as enterprises and organizations inspired by solidarity, to respond to their members’ needs and the needs of society, including those of disadvantaged groups in order to achieve their social inclusion.

II. POLICY FRAMEWORK AND ROLE OF GOVERNMENTS

6. balanced society necessitates the existence of strong public and private sectors, as well as a strong cooperative, mutual and the other social and non-governmental sector. It is in this context that Governments should provide a supportive policy and legal framework consistent with the nature and function of cooperatives and guided by the cooperative values and principles set out in Paragraph 3, which would:

- (a) establish an institutional framework with the purpose of allowing for the registration of cooperatives in as rapid, simple, affordable and efficient a manner as possible;
- (b) promote policies aimed at allowing the creation of appropriate reserves, part of which at least could be indivisible, and solidarity funds within cooperatives;
- (c) provide for the adoption of measures for the oversight of cooperatives, on terms appropriate to their nature and functions, which respect their autonomy, and are in accordance with national law and practice, and which are no less favourable than those applicable to other forms of enterprise and social organization;
- (d) facilitate the membership of cooperatives in cooperative structures responding to the needs of cooperative members; and
- (e) encourage the development of cooperatives as autonomous and self-managed enterprises, particularly in areas where cooperatives have an important role to play or provide services that are not otherwise provided.

7. (1) The promotion of cooperatives guided by the values and principles set out in Paragraph 3 should be considered as one of the pillars of national and international economic and social development.

(2) Cooperatives should be treated in accordance with national law and practice and on terms no less favourable than those accorded to other forms of enterprise and social organization. Governments should introduce support measures, where appropriate, for the activities of cooperatives that meet specific social and public policy outcomes, such as employment promotion or the development of activities benefiting disadvantaged groups or regions. Such measures could include, among others and in so far as possible, tax benefits, loans, grants, access to public works programmes, and special procurement provisions.

(3) Special consideration should be given to increasing women's participation in the cooperative movement at all levels, particularly at management and leadership levels.

8. (1) National policies should notably:

- (a) promote the ILO fundamental labour standards and the ILO Declaration on Fundamental Principles and Rights at Work, for all workers in cooperatives without distinction whatsoever;
- (b) ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises;
- (c) promote gender equality in cooperatives and in their work;
- (d) promote measures to ensure that best labour practices are followed in cooperatives, including access to relevant information;
- (e) develop the technical and vocational skills, entrepreneurial and managerial abilities, knowledge of business potential, and general economic and social policy skills, of members, workers and managers, and improve their access to information and communication technologies;
- (f) promote education and training in cooperative principles and practices, at all appropriate levels of the national education and training systems, and in the wider society;

- (g) promote the adoption of measures that provide for safety and health in the workplace;
- (h) provide for training and other forms of assistance to improve the level of productivity and competitiveness of cooperatives and the quality of goods and services they produce;
- (i) facilitate access of cooperatives to credit;
- (j) facilitate access of cooperatives to markets;
- (k) promote the dissemination of information on cooperatives; and
- (l) seek to improve national statistics on cooperatives with a view to the formulation and implementation of development policies.
 - (2) Such policies should:
 - (a) decentralize to the regional and local levels, where appropriate, the formulation and implementation of policies and regulations regarding cooperatives;
 - (b) define legal obligations of cooperatives in areas such as registration, financial and social audits, and the obtaining of licences; and
 - (c) promote best practice on corporate governance in cooperatives.

9. Governments should promote the important role of cooperatives in transforming what are often marginal survival activities (sometimes referred to as the “informal economy”) into legally protected work, fully integrated into mainstream economic life.

III. IMPLEMENTATION OF PUBLIC POLICIES FOR THE PROMOTION OF COOPERATIVES

10. (1) Member States should adopt specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles set out in Paragraph 3, and revise such legislation and regulations when appropriate.

(2) Governments should consult cooperative organizations, as well as the employers’ and workers’ organizations concerned, in the formulation and revision of legislation, policies and regulations applicable to cooperatives.

11. (1) Governments should facilitate access of cooperatives to support services in order to strengthen them, their business viability and their capacity to create employment and income.

- (2) These services should include, wherever possible:
 - (a) human resource development programmes;
 - (b) research and management consultancy services;
 - (c) access to finance and investment;
 - (d) accountancy and audit services;
 - (e) management information services;
 - (f) information and public relations services;
 - (g) consultancy services on technology and innovation;
 - (h) legal and taxation services;
 - (i) support services for marketing; and
 - (j) other support services where appropriate.

(3) Governments should facilitate the establishment of these support services. Cooperatives and their organizations should be encouraged to participate in the organization and management of these services and, wherever feasible and appropriate, to finance them.

(4) Governments should recognize the role of cooperatives and their organizations by developing appropriate instruments aimed at creating and strengthening cooperatives at national and local levels.

12. Governments should, where appropriate, adopt measures to facilitate the access of cooperatives to investment finance and credit. Such measures should notably:

- (a) allow loans and other financial facilities to be offered;
- (b) simplify administrative procedures, remedy any inadequate level of cooperative assets, and reduce the cost of loan transactions;
- (c) facilitate an autonomous system of finance for cooperatives, including savings and credit, banking and insurance cooperatives; and
- (d) include special provisions for disadvantaged groups.

13. For the promotion of the cooperative movement, governments should encourage conditions favouring the development of technical, commercial and financial linkages among all forms of cooperatives so as to facilitate an exchange of experience and the sharing of risks and benefits.

IV. ROLE OF EMPLOYERS' AND WORKERS' ORGANIZATIONS AND COOPERATIVE ORGANIZATIONS, AND RELATIONSHIPS BETWEEN THEM

14. Employers' and workers' organizations, recognizing the significance of cooperatives for the attainment of sustainable development goals, should seek, together with cooperative organizations, ways and means of cooperative promotion.

15. Employers' organizations should consider, where appropriate, the extension of membership to cooperatives wishing to join them and provide appropriate support services on the same terms and conditions applying to other members.

16. Workers' organizations should be encouraged to:

- (a) advise and assist workers in cooperatives to join workers' organizations;
- (b) assist their members to establish cooperatives, including with the aim of facilitating access to basic goods and services;
- (c) participate in committees and working groups at the local, national and international levels that consider economic and social issues having an impact on cooperatives;
- (d) assist and participate in the setting up of new cooperatives with a view to the creation or maintenance of employment, including in cases of proposed closures of enterprises;
- (e) assist and participate in programmes for cooperatives aimed at improving their productivity;
- (f) promote equality of opportunity in cooperatives;
- (g) promote the exercise of the rights of worker-members of cooperatives; and
- (h) undertake any other activities for the promotion of cooperatives, including education and training.

17. Cooperatives and organizations representing them should be encouraged to:
- (a) establish an active relationship with employers' and workers' organizations and concerned governmental and non-governmental agencies with a view to creating a favourable climate for the development of cooperatives;
 - (b) manage their own support services and contribute to their financing;
 - (c) provide commercial and financial services to affiliated cooperatives;
 - (d) invest in, and further, human resource development of their members, workers and managers;
 - (e) further the development of and affiliation with national and international cooperative organizations;
 - (f) represent the national cooperative movement at the international level; and
 - (g) undertake any other activities for the promotion of cooperatives.

V. INTERNATIONAL COOPERATION

18. International cooperation should be facilitated through:
- (a) exchanging information on policies and programmes that have proved to be effective in employment creation and income generation for members of cooperatives;
 - (b) encouraging and promoting relationships between national and international bodies and institutions involved in the development of cooperatives in order to permit:
 - (i) the exchange of personnel and ideas, of educational and training materials, methodologies and reference materials;
 - (ii) the compilation and utilization of research material and other data on cooperatives and their development;
 - (iii) the establishment of alliances and international partnerships between cooperatives;
 - (iv) the promotion and protection of cooperative values and principles; and
 - (v) the establishment of commercial relations between cooperatives;
 - (c) access of cooperatives to national and international data, such as market information, legislation, training methods and techniques, technology and product standards; and
 - (d) developing, where it is warranted and possible, and in consultation with cooperatives, employers' and workers' organizations concerned, common regional and international guidelines and legislation to support cooperatives.

VI. FINAL PROVISION

19. The present Recommendation revises and replaces the Co-operatives (Developing Countries) Recommendation, 1966.

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Cooperatives contribute significantly to economic and social development in virtually all countries of the world. Their documented resilience to crisis and thus sustainability, and their particularity of being principles-based enterprises that are member-controlled and led are increasingly drawing the attention of governments, policy-makers and citizens around the world. The fact that cooperatives serve their members and as such balance the need for profitability with the needs of their members makes them different from stock companies and thus requires laws that recognize their specificities.

The ILO has played a key role in providing guidance and advice on the creation of enabling environments for cooperative development at national, regional and international levels. In the mid-1990s it first commissioned the elaboration of guidelines for cooperative legislation to fill the gap of information on how to draft a cooperative law and policy. In 2005 a second edition was produced to provide information on two new international instruments on cooperatives – the United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives, and the 2002 ILO Recommendation No. 193 on the promotion of cooperatives.

This new third edition has been produced to incorporate more new developments that impact how cooperative law is being developed. These new developments are multiple and include a general trend in the harmonization of law, the emergence of international regulations which directly impact enterprises, new regional cooperative legislation and regional framework laws as well as innovation in the cooperative form of enterprise itself.

These guidelines are a contribution to fulfilling the aims of the United Nations International Year of Cooperatives celebrated in 2012 and its follow-up.

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