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THE CO-OPERATIVE SOCIETIES ACT 2001 - A COMMENT ON THE RECENT REFORMS IN MALTESE CO-OPERATIVES LAW

Scope of the Paper

The principal legislation governing co-operative societies in Malta is the Co-operative Societies Act which was passed by Parliament in 2001. It was brought into force in stages the following year. The 2001 Act has repealed and replaced the co-operative legislation that preceded it, namely the Co-operative Societies Act 1978. This recent reform and the introduction of new legislation for co-operatives offers, in the view of the writer, a timely opportunity for a fresh look at the subject of co-operative law, and how co-operatives in Malta are or should be regulated in the 21st century.

This paper reviews some of the main features, innovations and improvements in the new Act and offers a brief analysis of the significance and impact of the transition from the now repealed Act of 1978 Act to the 2001 Act. It attempts to place this transition within the context of other recent developments in Maltese corporate law especially the adoption of the Companies Act of 1995. Highlighting certain elements in the legislation that tend to be overlooked, the paper explores the motivation behind the recent reforms. This exercise should throw light on how

25 years and had not been adapted to tackle today's challenges."[3] A new law was eventually drawn up, published and presented to Parliament.

The Co-operative Societies Act 2001 is the third legal instrument passed in the course of this century specifically aimed at establishing a suitable legal framework for the formation and operation of co-operatives. The three enactments are:

(i) **The Co-operative Societies Ordinance of 1946**
This was introduced by Ordinance No. XXXIV of 1946, adopted on the 8 July 1946 and brought into force on the 12 December 1946. Its stated purpose was *"to provide for the constitution and regulation of cooperative societies"*.

(ii) **The Co-operative Societies Act of 1978**
This Act was listed as Chapter 278 of the Laws of Malta and was brought into effect on the 16 April, 1979. Its stated purpose was *"to provide, in place of the Co-operative Societies Ordinance, 1946, for the constitution, registration and control of co-operative societies and for matters connected therewith..."*.

(iii) **The Co-operative Societies Act of 2001**
This more recent Act describes itself as *"An Act to provide for the constitution, registration and control of co-operative societies and for matters connected therewith or ancillary thereto."* It is listed as Chapter 442 of the Laws of Malta.

Originally, the intention was to revise, improve and update the provisions of the 1978 Act, not to replace it. It was felt that a limited exercise, capable of being undertaken

A very brief and selective historical note

How did the 2001 Act come into being? It may be useful to take a brief (and admittedly sketchy) look back. In the years prior to 2001, unspecified legislative changes to the Co-operative Societies Act, 1978 had been periodically promised by various official sources.

An early and quite comprehensive ten-page study was published by the Co-operatives Board in November 1993 as a "Proposed Policy for the Development of Cooperatives in Malta". The document stated its purpose as *"intended to highlight the need that a new impetus be given to the Cooperative Movement in Malta. While it is a formulation of policy objectives, it is by no means intended to place the movement and the Central Cooperatives Board in a straight jacket. It should rather serve to provide an inspiration for future initiatives and possibly for legislative reform in this area."*[1]

A Sunday Times report of 14 July 1996 covered an address by the then Environment Minister, Dr F Zammit Dimech, headed *"Growing interest in cooperatives"*. A few days earlier, the then Parliamentary Secretary Dr Joseph Cassar had been quoted as saying that *"The cooperative movement is gaining ground in Malta as its members and productivity increases steadily"*.[2] More significantly, Dr Cassar also gave notice that *"legal reform to bring legislation up to date is in the pipeline"*. On the 5 July 1998, the Independent on Sunday reported that *"Social Welfare Minister Edwin Grech expressed the hope that the draft bill of the amended Cooperatives Law will be ready by the end of 1998. These will be the first changes to be effected in the law since it was passed by Parliament in 1978."*.

On the 18 January 1999, a Times report headed *"Government planning to upgrade cooperatives law"*, reported the then Social Policy Minister Dr L. Gonzi as saying that *"the law on cooperatives...had remained unchanged for the past*

The Constitutional Context

The Constitution and co-operatives in the same sentence. The Constitution is where all law acquires its legitimacy. It is the basis of legality in our country, a document which establishes the different arms of the state and which assigns legislative authority to Parliament. Chapter 11 of the Constitution sets out a *"Declaration of Principles"*. This occupies articles 7 to 21 of the Constitution. These principles are described as *"fundamental to the governance of the country"*. Article 20 lists the *"encouragement of cooperatives"* as one of the fundamental principles to which the State must adhere. The full statement is: *"The State recognises the social function of cooperatives and shall encourage their development."*

Regrettably, these principles are not so fundamental as they may not be enforced in a court of law,[5] although it remains a duty of the state to *"apply these principles in making laws"*.[6] This official recognition of the social importance of co-operatives in the highest law remains significant despite its non-enforceability.

Arguably, these principles seem to reside in a kind of no man's land, simultaneously law and non-law. On the one hand, they carry moral authority and provide a useful expression of intent and values. On the other, they offer a potentially negative precedent and a legal hodgepodge seeing that it is of the essence of law to be binding and to create rights and obligations.

Returning to the co-operative context, an analogous question arises. A new formulation has been articulated for the re-stated Co-operative Principles (see further below) under Part III of the 2001 Act.

within a reasonably short time, would have sufficed at that stage of co-operative development. Had the original intention been that of creating a brand new Act, a formal policy white paper would probably have been published to accompany the beginning of the drafting exercise.[4]

At various stages during 1998-2000, following some initial studies and consultation, a number of specific areas were being identified as ripe for revision and updating. The 1978 legal framework had been the point of departure for the enterprise. Eventually, as the drafting work proceeded, and as new ideas flowed, the proposed amendments started to gradually take shape and seemed to assume a life of their own outgrowing the confines of the 1978 Act. The Act no longer guaranteed a suitable platform for the extensive reforms that were maturing. A new framework was needed to house them coherently. A decision was soon taken at ministerial policy level to formulate the proposed changes in the shape of a brand new Act, and have them presented to Parliament accordingly.

Although the 2001 Act is for all purposes a new law, its construction relied heavily on the 1978 Act. While introducing significant improvements and several new elements, there was concern to safeguard continuity. In the writer's view, the new Act does not constitute a complete break with the past. It does however represent a fresh start and a relevant new landmark in local co-operative history. The shift towards replacing rather than amending the 1978 law certainly presented a wider opportunity to re-appraise old concepts and mechanisms and to contemplate and implement new ideas and solutions.

The Co-operative Societies Act of 1978 disclosed a more evident interest in the underlying economic performance of registered co-operatives. In fact, the 1978 Act required the Board to monitor how registered co-operatives were actually performing and to offer them assistance. The Board was also specifically called upon to try *"to help cooperative societies to increase their efficiency"*,[9] a requirement which does not feature in the recent 2001 Act or in company law.

The Transition from the 1978 Act to the 2001 Act

When the new Act was being designed, steps were taken to ensure that business could carry on as usual without any unnecessary disruption. This is an issue which always needs to be tackled with care whenever a particular legal framework is being altered, and especially when an entire law is being replaced. In these instances, one is bound to find what are often referred to as *transitional* arrangements. These would explain when, how and to whom the new provisions would apply. The Co-operative Societies Act 2001 was brought into force on the strength of Legal Notice 49 of 2002. The transitional arrangements were laid down in some detail in the same Legal Notice[10], which brought the Act into force in three stages. All the articles of the new Act are now in force.[11]

With the adoption of the Co-operative Societies Act 2001, the 1978 Act was repealed.[12] None of its provisions remains in force and it is now consigned to legal and co-operative history. The new Act contained in-built mechanisms to guarantee the full legal and practical continuity of the Co-operatives Board and of the co-operatives already registered and operating under the previous law.[13] This step ensured that no needless uncertainties or gaps would

A Legal Framework for Co-operatives

The Co-operative Societies Act of 2001, like the 1978 Act before it, applies to all co-operatives seeking to establish themselves in Malta. It governs the establishment, legal status, management and dissolution of co-operative societies in Malta, whatever their activity or membership. Although not as detailed and voluminous as the Companies Act,[7] it is still quite a comprehensive law which manages to deal with most important issues.

A co-operative is a form of business organization recognized and supported by law. It is an artificial legal person, enjoying legal personality created by operation of the law following registration by a public authority. Registration leads to incorporation and the creation of an autonomous new subject capable of suing and be sued, of acquiring and holding property, entering into contracts, engaging employees, opening and operating bank accounts, etc.[8]

The 2001 Act primarily seeks to regulate the use of the particular vehicle or medium of the co-operative. Unlike such laws as the Banking Act and the Insurance Business Act, its main object is not to regulate a particular sector of business or professional activity. The 2001 Act sets out a revised updated framework to govern the formation, the management and the closing down of co-operatives, without revealing any particular interest in the actual underlying economic activity undertaken by the societies themselves. With this approach, the Act has shifted closer to company law. Co-operative and company law share a common concern to restrict the abuse of the corporate form and to promote minimum good governance standards. Beyond these concerns, they are broadly reluctant to delve into the actual commercial activities carried out by the entities they regulate.

made available by the new Act. It would be useful at this stage to identify some of the various options that may now be exercised by a co-operative society in the preparation of its statute:

(a) it may establish a Supervisory Board;
(b) it may provide for the duration of appointment of members on the Supervisory Board;
(c) it may provide that the members of the Committee of Management retire by rotation and may provide for the election of runners-up;
(d) it may provide for certain restrictions on members' activities and may impose penalties for breaches thereof;
(e) it may impose penalties for infringement of the statute;
(f) it may contain rules on conflict of interest and competition;
(g) it may allow meetings to be held electronically;
(h) it may refer disputes to Malta Arbitration Centre;
(i) it may state maximum rate of dividend payable to members;
(j) it may allow commercial partnerships to become members of the society;
(k) it may establish special qualifications for membership;
(l) it may provide alternative rules on voting rights;
(m) it may require that a motion for the dissolution of a society be confirmed at a second general meeting.

be occasioned by the legislative changes, and the business operations of registered co-operatives continued smoothly and suffered no disruption. All the decisions and actions taken by the Co-operatives Board under the old Act were safeguarded and were retained in force. This rule extended to all administrative and other measures adopted by the Co-operatives Board prior to the coming into force of the new law.

Some of the changes introduced in the new law necessitated a small number of amendments to the statutes of existing societies. These amendments reflected a number of options that the new law has allowed each society to adopt. The new law allowed co-operatives to choose from a number of alternative arrangements and gave them sufficient time to pass the necessary amendments. This marked a departure and an improvement from the 1978 Act which envisaged only one relatively static and rather restrictive co-operative structure. This new approach offers more flexibility for co-operatives to determine their internal structuring. It allows big and small societies to adopt arrangements more suitable to their size, resources and needs.

The changes also meant that freed from the one-model approach, co-operative societies now need to give much greater attention to the correct formulation of their statutes. They cannot rely any longer on the one-size-fit-all model at the core of the 1978 Act. Co-operatives now need to take several sensible fundamental decisions on how they wish to operate and to regulate their internal procedures. This is the small price existing co-operatives have had to pay in order to gain more flexibility in their internal arrangements as a consequence of the new law. In reality, only a few adjustments to existing statutes were required.[14]

Revisions to the statutes became necessary due to the new or revised concepts, obligations and possibilities

law now requires them to be respected and adhered to by all persons applying and interpreting the provisions of the Act.[16]

Co-operatives and their controllers as well as the Board and its employees are now required to consider these extraordinary principles as fundamental to their policies and day to day co-operative activities. In this sense, it appears safe to suggest that the co-operative principles now enjoy a freshly enhanced status, and are certainly no longer a vague *mission statement*. Whether this is sufficiently understood or applied in practice is of course a moot point. It would be interesting to gauge whether and how far these guiding principles effectively influence and inspire the daily workings and decisions of co-operatives and of the Co-operatives Board.

Selected new features of the 2002 Act

Space does not permit a complete identification and analysis of all the changes and new concepts introduced in the new Act. Still, this paper cannot fail to highlight some of the interesting features in the recent co-operatives law and to briefly comment on their implications. What follows is a personal and selective list.

Competition law

A complete novelty, article 40 of the new Act is where co-operative law meets competition law. It attempts to resolve the possible conflict that may arise between the law governing fair competition, anti-cartel and restrictive agreements on the one side, and co-operative statutes and agreements with members-producers on the other. Certain restrictive agreements are often entered into

Co-operative Principles – An Enhanced Status

One of the most striking innovations in the new Act is the re-statement and elaboration, in new article 21, of the seven core principles of co-operative existence. These principles set out the major underlying philosophical thinking behind the provisions of the Act itself. They clearly originate from the original principles defined and adopted in 1966 at the 23rd Congress of the International Cooperative Alliance. The law does not expressly refer to the ICA, but the origin is very evident.[15] Originally mentioned in an unduly telegraphic shape in article 11 of the 1978 Act, these principles have now been articulated in a more forceful and detailed manner. They are now better equipped to highlight the major concerns at the basis of a co-operative society's constitution and activities. In summary, they set out the following core set of values:

(a) voluntary and open membership;
(b) democratic member control;
(c) member economic participation;
(d) autonomy and independence;
(e) education, training and information;
(f) co-operation among co-operatives;
(g) concern for the community.

What is the legal status of these core principles? The Act states that they cannot be directly enforced through the courts. So have they too been devised as an unenforceable set of principles enjoying mere moral value on the lines of the Declaration of Principles under article 21 of the Constitution? Fortunately, the answer is likely to be a *"no"*, as the Act has taken pains to endow them with a higher status and to make them more effective in practice. The

106 and 107 define in some detail the procedures for the recognition of the Apex by the Board, including a number of basic formal requirements that it needs to satisfy. The Apex organization is today a member of the International Co-operative Alliance.

The role of the Minister

Various provisions of the 1978 Act handed discretionary powers of intervention to the Minister politically responsible for co-operatives. More enlightened thinking criticized these powers as troubling and unacceptable. In the new Act, the Minister's intrusion in co-operative matters has been greatly curtailed, with most of the offending provisions either withdrawn or suitably trimmed.

Article 20(4) allowed applicants to appeal to the Minister from a Board decision rejecting an application to register a society. Article 26(8) of the 1978 Act allowed an appeal to the Minister from a Board decision rejecting a proposed amendment to a society's statute.[22]

Articles 109, 110 and 102 of the 1978 Act elevated the Minister to the position of final arbiter over certain classes of disputes between parties involved in or with co-operatives. This allowed him to prevail over the Board acting in its regulatory role and put him at par with the Court of Appeal. The law has removed these powers and now seeks to direct these disputes towards arbitration.

The Minister's right to give directions to the Board too has been slightly but significantly re-visited. The relationship between the Minister and the Board is primarily governed by article 8. While largely reproducing the old article 8, it now pointedly requires the Minister to issue his directions *"in writing"*. The Board remains obliged to provide information to the Minister, but now only to enable him to exercise his functions under the Act, and in particular to issue policy

between competitors and suppliers within a co-operative society. This article seeks to establish a sensible balance between safeguarding certain societies' core objectives and operational requirements, and respecting the restrictive framework of the Competition Act of 1994[17] and, since 2004, the competition rules of the European Union.[18]

The 1994 Act treats all business and professional undertakings equally and makes no concessions to co-operatives. New article 40 *inter alia* tests the legitimacy and compatibility of such co-operatives rules and agreements on the grounds of necessity, proportionality and reasonableness and the need to safeguard the *"proper functioning of the society"*.[19]

The Apex Organization

The 1978 Act provisions regarding the Apex organization were patchy and inconveniently scattered throughout the Act. These have now been consolidated and presented much more coherently in Part X of the Act, which now makes more convenient reading. This tidying-up exercise has removed certain doubts that had arisen under the 1978 Act, particularly as whether it was strictly necessary for the Apex itself to assume the form of a co-operative. Having been a co-operative, under the 1978 Act, its internal organs and management had to be structured accordingly. It also fell under the regulatory supervision of the Board in every respect,[20] giving rise to an anomalous situation.

The new Act now describes the Apex as a voluntary association.[21] It requires the Apex to represent a majority of registered societies. This means there may only be one Apex organization, reflecting another clear policy decision. On the strength of such a mandate, the Apex could legitimately serve as the most important point of reference, lobby and voice for the co-operative movement. Articles

partnership) may only hold shares in a co-operative *"where the statute specifically so permits"*. Members are therefore free to make up their own minds on this question.

Subsidiary companies

New article 22 (3) now specifically recognizes that within certain parameters, a society may become a *parent society* and establish *subsidiary companies.*[30] The parameters require the subsidiary *"to fulfil, promote, complement or advance the objects"* of the co-operative, to keep it adequately informed of its activities and to take into consideration its wishes. This new rule seeks to extend, in a sensibly restrained manner, the range of commercial opportunities and arrangements that co-operatives can now enter into, an underlying motive behind several changes introduced in the 2001 Act.

Conversions

It has now become, at least on a conceptual level, possible to convert a co-operative society into a commercial partnership, and vice versa. The precise legal mechanism to enable either process to happen has not yet been provided. Indeed, article 108 (4) foresees the issuing of regulations by the Minister for this purpose. The article makes a reference to the relevant articles in the Companies Act, which however do not yet permit or recognize the conversion of a commercial partnership into a co-operative or other entity not regulated by the Companies Act. This means that appropriate amendments to the Companies Act would have to precede the issue of any such regulations.

Public sector co-operative schemes

Public sector co-operatives present particular characteristics.[31] A few societies had been registered under the 1978 Act, which however did not specifically recognize

directions. The Minister retains his prerogative to appoint the Board[23] and to make regulations on the various matters listed in article 108.

The Malta Arbitration Centre

The new Act[24] specifically mentions the possibility of referring disputes involving co-operatives to the Malta Arbitration Centre.[25] This new approach has replaced the former rule that co-operative-related disputes were to be determined by the Board or (worse) by the Minister. The Act now actively encourages the submission of these disputes to arbitration, seen as a more flexible and low-key method of settling disputes. The attempt to shield co-operative disputes from the ordinary courts (and presumably the general public) was a constant theme running through the 1978 provisions, which perhaps tried too hard to retain such disputes in–house.[26]

Membership

Under the new Act, a co-operative is now required to have at least five members,[27] upon its commencement and also on a continuous basis thereafter. The previous minimum under the 1978 Act was seven members, whereas the 1946 Ordinance originally required at least twelve members.[28] This change was intended to facilitate the establishment of very small co-operatives. These small undertakings may now also opt to do without a supervisory board, thereby resolving another difficulty that small societies encountered under the former law.[29]

Another innovation is the introduction of specific rules governing the holding of shares in a co-operative society by a company or other commercial partnership. New article 53 (2) lays down conditions and restrictions. An important limitation states that a company (or other commercial

As was the case in the previous Act, the Co-operative Societies Act of 2001 lists a number of mandatory posts that have to be filled by society officials. These posts have to carry the specific designations laid down in the Act. Another mandatory requirement is the appointment of an auditor. These posts are mandatory for all societies, without distinction. These are minimum requirements and they do not exclude additional appointments; provided, it would seem, that any additional appointments do not adversely affect the powers and functions of the statutory organs and officials.

Every Co-operative is obliged to make formal appointments to the following posts:

(a) the committee of management[33];
(b) the following officials: a President[34], a Vice-President[35], a Secretary[36], and a Treasurer[37];
(c) the auditor[38].

The new Act has confirmed the requirement for every co-operative to have a **committee of management,** roughly comparable to the board of directors of a company. Its functions are listed in article 74 while its "*Conduct of affairs*" is described in article 76.

These two rules owe their origin to the 1978 Act[39] and constitute a truly inspired piece. These two articles taken together in fact outline perhaps the earliest local example of a minimum corporate governance statement. They lay down a sufficiently well-phrased benchmark of behaviour and performance to be expected from the members of a committee of management. The slightly updated 2001 statement now require members to exercise "*the prudence and diligence of ordinary persons of business*" and to implement "*proper and prudent accounting policies*". It holds them jointly and severally liable for any losses occasioned through

them. In certain respects, their status under that law raised a few doubts. For the first time, the 2001 Act specifically refers to them. The law has tried to clarify their legal position, thereby removing the uncertainties regarding this category of co-operatives. They are now specifically recognized as a special category of co-operatives and are – to a degree – regulated differently. Article 29 (3) describes them as *"Societies set up in accordance with co-operative schemes developed by government for public employees"* and requires the Board to have them registered separately from other societies. The Minister is also empowered to issue regulations to govern (and to lengthen) the duration of their provisional registration.[32]

Internal Management

The Act, like the 1978 Act, regulates in some detail the manner a co-operative is to be internally organised and managed. It lists the various organs which have to be set up and their respective functions, as well as a number of official posts that have to be filled and the respective duties attaching thereto. This means that the law does not allow a society absolute freedom as to how it can organize itself internally. In this respect, however, the new Act allows greater space and scope for alternative arrangements than the 1978 Act.

The Act expects a high standard of performance from co-operatives and their officials. To this end, the law lays down several stringent rules relating to proper record-keeping and the need to adopt proper management and reporting systems and procedures. Proper financial statements are to be prepared annually and submitted to a proper audit carried out by qualified professionals.

or wishes of its members, to set up a board to operate as a second tier of management authority. No similar or equivalent structure is known to our company legislation. Article 78, now discontinued, described the various and surprisingly wide functions of the board.

In practice, small co-operatives often failed to muster sufficient officials to man the board or found it too costly. Local experience also revealed that some societies actually operated (and seemingly well) without a board, although strictly this constituted a breach of the Act. Regrettably, where a functioning supervisory board had been set up, uncertainties and confusion often arose as how it co-existed with the committee of management. It seems that some boards were unable to shake off the temptation to double-guess the committee of management's decisions and attempted to dictate matters to it. One main cause of this overlap was the broad terms in which the board's functions were formulated in article 78.

The new law has sought to restore some order and to reduce the potential for overlap or confusion of roles. One significant and welcome remedy is making the supervisory board[41] no longer mandatory but optional. It is now set up only if it is either required by express provision of the statute; or is required by a resolution of the general meeting.

Where set up, the board is answerable and reports to the general meeting. The board is expected to assist the committee of management *"in the effective and efficient running of the society"*[42] and to monitor the management and to guarantee legality. The board is not there to obstruct or undermine management or try to take decisions in its place. Should the supervisory board wish to send an urgent message to the members on matters falling under its competence, it has been given the extraordinary right to

"failure on their part to exercise such prudence and diligence..." or through failure to adhere to the statute or the law.[40]

Article 65 of the 1978 Act helpfully described the main functions and powers of the committee of management and has been retained with minimal changes as new article 74. An extraordinary power which the new Act has assigned to the Board is found under Part II which deals with the powers of the Board. This tackles a potential crisis situation, which did occur in practice though rarely, where the committee of management for whatever reason stops functioning or is functioning contrary to the statute or the law. The law has responded to the need that a solution be found to extricate the society out of this impasse which may cost it relevant commercial and financial repercussions. With the regulatory framework now available, one can think of at least two solutions. Ideally, a general meeting of the members should be convened without delay to take stock of the matter, decide the necessary steps, revise the composition of the committee and issue appropriate directives. Where the impasse, as may indeed happen, renders it difficult even to summon a general meeting or to achieve a quorum, the Board may now step in and exercise its new powers and remove and temporarily replace the committee. The appointees shall than be responsible to manage the society's activities and they shall be obliged to arrange the convening of a general meeting for the election of a new committee, even with the moral and logistical assistance help of the Board itself, as may be necessary. These extraordinary powers are only to be used in extraordinary circumstances. The Board would use these powers sparingly and only where all else fails.

The new law has also re-appraised the role and status of the **supervisory board**. The 1978 Act had required every society, irrespective of its size and irrespective of the will

society is obliged to hold an annual general meetings and article 66 (broadly equivalent to former article 59) very usefully specifies in detail the matters that such meetings are required to consider. In brief, these include:

(a) the approval of the financial statements;
(b) the appointment of the committee of management;
(c) the appointment of the supervisory board, if any;
(d) the consideration of any proposed amendments to the statute;
(e) the consideration of the auditor's report;
(f) the appointment of the auditor;
(g) the consideration of the distribution of the net surplus;
(h) the determination of the maximum borrowing limit of the co-operative;
(i) the hearing of appeals and complaints in respect of certain decisions of the committee of management;
(j) the payment of honoraria, fees and other remuneration.

The Act also regulates in some detail the procedures to be followed at general meetings, the quorum required and the keeping of minutes. New rules governing the manner of appointing of the committee of management have also been introduced.

The Auditors

The 2001 Act expects a high standard of performance from co-operatives and their officials. To this end, the law lays down several stringent rules relating to proper record-keeping and the need to adopt proper management and

require *"at any time"* the summoning of an extraordinary general meeting[43].

The two-tier management and supervision system under the 1978 Act was unique to co-operatives. On paper, it appeared to offer a sound approach with one level overseeing the other thereby guaranteeing better corporate governance. In practice the system did not work properly and in some cases proved a hindrance rather than an advantage. Most co-operatives were too small to warrant or sustain a double layer structure of management.

Rather than eliminate the supervisory board altogether, policy preferred allowing societies to decide for themselves. In the appropriate cases, where adopted voluntarily, the supervisory board mechanism may still afford significant benefits to societies and their members, now solely responsible for weighing the likely benefits of having a supervisory board against the possible disadvantages.

Following United Kingdom practice, locally registered companies have invariably adopted the single-tier management system consisting of a board of directors. The Companies Act, as did the Ordinance before it, has only ever recognized the board of directors. No suggestion to change this practice has ever been recorded. The board of directors is a mandatory organ under company law as the committee of management is mandatory under co-operatives law.

The **annual general meeting** is established as the supreme authority of a co-operative. In this respect, the law has remained the same.[44] Generally, all members are entitled to attend and vote at the meeting. The first general meeting shall be held within six (formerly three) months of the issue of the certificate of registration. The purpose of this early meeting is primarily to elect the officers of the society as required by the Act[45] as soon as possible. Every

auditor of a co-operative from accepting appointment unless he has been vetted and authorised by the Board. This rule has been removed. The recent amendments have also done away with the previous grandmotherly rule whereby the Board was obliged to vet and approve the fees that an auditor was proposing to charge a co-operative for his services. Under the new Act, any person qualified to act as auditor of a company in terms of company legislation is considered qualified to audit cooperatives.[48]

Article 96 of the 1978 Act was another important rule which has been re-visited. This article, whose origin may be traced to the practice under the 1946 Ordinance, made the Co-operatives Board responsible *"to supervise the auditing of every society"*. Now considered archaic, intrusive and disrespectful to the auditing profession, the rule has been eliminated from the 2001 Act.

The rules governing the status and duties of auditors in the 2001 Act have been updated to take into account recent developments in the auditing profession and in auditing and accounting standards. Article 49 requires the auditor to ascertain whether the Management Board complied with the provisions of the Act, with the statute and with good accounting practice.

Section 41 of the 1978 Act regulated the audit of the financial statements of a co-operative. The auditor was required to confirm *"whether the financial statements show fairly the financial transactions and the state of affairs of the society"*. He was also obliged to report directly to the Co-operatives Board *"any irregularity disclosed by the inspection and audit that is, in the opinion of the auditor, of sufficient importance to justify his doing so"*.

Indeed, the 1978 Act may have been the first law in Malta to introduce a tentative form of mandatory whistle-blowing. Article 41 required an auditor to immediately notify the

reporting systems and procedures. Accordingly, article 48 highlights the obligation of every cooperative to keep *"proper accounts and records of its transactions and affairs"*, to ensure that all payments are *"correctly made and properly authorized"* and that the society's assets are properly safeguarded. Financial statements are to be drawn-up annually. These are to be completed not later than two months after the relative year-end and then submitted to an audit. The reforms in co-operative accounting and audit obligations introduced by the 2001 Act are considerable and have brought co-operatives regulation closer to the company law rules.

In the Companies Act, auditors play an important role in overseeing the keeping of accounts and the verification of corporate financial statements. The same is true of both the 1978 and 2001 Acts. New detailed accounting rules have been introduced in the 2001 Act and the model adopted is the Companies Act 1995. Direct references are made to the application of *'International Accounting Standards'* and of *'International Standards on Auditing'* to co-operatives.[46] A new Third Schedule has been added to the Act explaining the Form and Content of Individual Accounts.

From a historical angle, this development represents a sizeable departure from the practice apparently prevalent under the 1946 Ordinance. In his annual report for 1947-8, (very soon after the Ordinance came into force), the Registrar made some revealing comments. Under the part headed *"Auditing and Supervision"*, the then Registrar, Mr O. Paris, lamented that the newly registered societies lacked accounting expertise: *"all secretaries started their work without any knowledge of book-keeping........"*. As a result, *"The audit of the accounts of all the societies was carried out solely by the staff of the department."*.[47]

The new Act of 2001 has now reduced the auditing role of the Board to a minimum. The 1978 law prohibited an

The Co-operatives Board

Fundamental to the regulatory structure of the 1978 Act was the creation of a new licensing and supervisory public authority known as the Co-operatives Board. The Act assigned the Board extensive powers and functions intended to enable it to play the central role in the supervision, performance, conduct and promotion of the co-operative movement, and in the general administration of the Act. Indeed, the extensive role and considerable powers of intervention assigned to the Board probably constituted the most extraordinary feature of the now repealed Act. These powers were unduly intrusive and went beyond what a normal regulatory agency would need to exercise its functions effectively. While seeking to rectify this situation, the 2001 Act has nonetheless retained and confirmed the central role of the Board but has made a less intrusive instrument. It has chipped away at several powers no longer considered justified or necessary.

The 2001 revisions in this area respond to the need to re-adjust the focus of the Board's role in the new legislative framework, emphasizing its regulatory agency function. The changes introduced in the 2002 Act have helped to better re-define its core functions now reduced to their essentials. The Co-operatives Board still however maintains and exercises considerable supervisory authority.

While it is operationally independent, the Board falls under the political umbrella of the Minister responsible for Social Policy,[52] on whom it relies for appointment, funding and general political support.[53] The Board may only receive written general directions of policy from the Minister who may not intervene in decisions affecting the operations of particular co-operatives. The Board is obliged to furnish the Minister with all available relevant information to enable him to exercise his now reduced powers.

Board of any irregularity resulting from the audit which *in his opinion* was important enough to justify this action. Article 49 of the new Act has been articulated differently. It now requires an auditor to *"forthwith inform the Board and the society or any of its officers of any material irregularity disclosed in the course of his audit"*. The purely subjective test established by the 1978 Act has been replaced by a broader and more objective test. The new Act, in its re-formulation, concedes less personal discretion to the auditor. The duty to disclose irregularities has not only been retained but has been extended to liquidators of co-operative societies.

The 2001 Act requires an auditor to certify that the society has complied with the provisions of this Act, and specifically *"whether the society has functioned in accordance with its Statute and the provisions of this Act"*.[51] The law is looking for an audit exercise which is more than a verification of numbers and figures. This new requirement should not be misunderstood to mean that the auditor is expected to police and monitor the society's daily acts and omissions. One would suggest that the law requires an auditor not to ignore troubling signals he may come across, even accidentally, during his engagement. An auditor should now be prepared to react appropriately whenever problems of a material or regulatory nature result during the course of an audit.

On the other hand, it appears unrealistic to interpret the law as requiring the auditor to undertake a separate speculative compliance-policing investigation parallel to the regular audit. The law does however imply that an auditor should be fairly knowledgeable of the provisions of the Act. It also expects him not to look the other way when evidence of corporate fraud or other material wrong-doing is unearthed.

with the law's requirements. It is not meant as a revenue-collecting measure but rather as an effective deterrent to enable the Board to impose a degree of order in the area under its statutory jurisdiction. It is a normal power assigned to regulatory authorities. Additional ministerial regulations were issued in 2003.[57]

Under the new Act, monetary fines may be imposed on a co-operative society, its officers and its auditors. In each case, the penalty may be imposed for a breach of the Act or of an order issued by the Board. The law sets out the procedure to be followed when the imposition of a penalty is being contemplated. This serves to protect the due process rights of the person or society being accused of the breach.

One may describe the primary functions of the Board as follows:

- to promote the co-operative movement in Malta;
- to assist and facilitate the formation of co-operatives;
- to receive and process applications and to register new co-operatives;
- to supply information on co-operative societies;
- to monitor and supervise the general performance of cooperatives;
- to oversee the administration of the Act
- to ensure compliance with its provisions.

The recent amendments have made the Board's position more coherent, permitting it to concentrate its attention and to employ its scarce resources on leaner and more precise core functions.

To conclude this part, what follows is a non-exhaustive list of functions and powers assigned to the Board by the 1978 Act and which the 2001 Act has either eliminated or reduced. This list should better illustrate the backdrop to the

Although the Co-operatives Board is constituted primarily as a regulatory authority, it also acts as a registrar, the keeper and custodian of a publicly accessible registry, designated the Registry of Co-operative Societies. This registry contains important statutory and other documents pertaining to all registered societies.[54] The Board is both regulator and registrar.

It would be a misreading of the Act to suggest that the Board is now only comparable to the Registry of Companies under the Companies Act. The Board plays a more complex role as its supervisory and promotional functions have survived and indeed remain extensive. The Board may be described as playing these three fundamental roles, in order of importance: regulator, registrar and facilitator.[55]

As a registrar, the Board has responsibilities similar to other registrars. As a regulatory agency, the Board has powers similar to other regulators. Indeed, the extraordinary reserve powers now assigned to the Board to suspend a society's activities and replace the committee of management, where grave circumstances so warrant, have already been noted earlier. These powers are necessary to preserve the integrity of the co-operative sector, guarantee a degree of transparency and to prevent abuse of the co-operative form. The new Act safeguards and upgrades the Board's powers of enquiry and investigation and adds new powers to impose fines on uncooperative societies and their officials for contravening the Act. While removing certain functions envisaged in the 1978 Act, the new law has strengthened the Board's enforcement powers, making it into a more effective agency.

Indeed, a new provision in the 2001 Act gives authority to the Co-operatives Board to impose administrative penalties.[56] No similar power existed under the 1978 Act and its introduction was meant to encourage more compliance

of a co-operative which had received government financing.[69]

(m) It approved loans by one co-operative to another and determined the maximum amount that a cooperative could borrow.[70]

(n) It approved and imposed conditions on any proposed issue of bonds or debentures by a society.[71]

(o) It had to review for approval certain investments of funds by co-operatives.[72]

(p) It had the authority to direct a co-operative to rectify any *defects disclosed in the audit, inquiry or examination of its books*.[73]

(q) It could be requested to hear and to determine (or refer to arbitration) disputes that may arise between a society and its members or officers, between members of the same cooperative, between different cooperatives; it could change its mind on the approach initially adopted thereon, but in any case its decision was *final*.[74]

(r) It had to determine and decide any dispute on the interpretation of a society's statute and its ruling was *final*.[75]

(s) It could prescribe what books and accounts a co-operative shall keep and what returns were to be submitted to the Board.[76]

A Note on the Central Co-operative Fund

For a company lawyer, one of the more surprising features introduced in the 1978 Act and retained in the 2001 Act is the constitution of the Central Co-operative Fund. This fund is a typical feature in co-operative legislation, but would be simply unheard of in any other commercial or

recent reforms in the role of the Board and the motivation behind the changes.

(a) It was expected to act as advisor to government on co-operative matters, including *financial assistance.*[58]
(b) It was expected to *exercise control* over co-operatives.[59]
(c) It was expected to *encourage the establishment of co-operatives* and *to help them to increase their efficiency.*[60]
(d) It was obliged to provide the services of specialised personal to assist in the *formation, organisation and operation* of co-operatives.[61]
(e) It was obliged to provide *technical advice to all kinds of societies registered under this Act.*[62]
(f) It was expected to disseminate information regarding *co-operative principles, practices and management....*[63]
(g) It was obliged to assist officials of a co-operative *in complying with the provisions of this Act and in achieving the objects and purposes of the society on a co-operative basis.*[64]
(h) It approved the appointment of the auditors of each single co-operative as well as their professional fees.[65]
(i) It was obliged to *supervise the auditing of every society.*[66]
(j) It had the right to *attend general meetings and committee meetings of any co-operative* and to request copies of any relative agenda, notice, minutes and relative correspondence.[67]
(k) It had the right *to convene a special general meeting* of a society and determine the agenda.[68]
(l) It could appoint *one special member* on the committee of management and one on the supervisory board

that had been encountered under the less detailed 1978 framework.

The Central Co-operative Fund Regulations[79] issued by the Minister complete the framework for the proper administration of the Fund. They establish a joint committee made up of two members nominated by the Board and four representatives of registered co-operatives. The Apex nominates one other member. This committee is obliged to *"exercise a high degree of diligence in administering the funds under its responsibility"*. The Regulations require the keeping of proper accounts and records of all the financial transactions of the Fund as well as an annual audit. Regulation 3 sets out in some detail the purposes for which the Fund's assets may be employed. Emphasis is placed on education, training and research on co-operative activity.

The Co-operative Societies Act 2001 and Company Law

The context

The Co-operative Societies Act of 1978 contained 117 articles and two schedules. Adopted by Parliament after a lengthy debate, this Act may be considered the first modern local law to regulate co-operatives. It was repealed and replaced in 2002 when the 2001 Act came into force.

The Commercial Partnerships Ordinance,[80] consisted of 195 articles and four schedules. It entered into force in 1965. The Ordinance may be considered the first modern company legislation in Malta. The Commercial Partnerships Ordinance was to limited liability companies what the 1978 Act had been to co-operatives. The Ordinance remained in force until 1996 when it was replaced by the more voluminous Companies Act of 1995 with its 431 articles and eleven schedules.

company law context. This Fund is often described as enshrining the solidarity objective which the Act seeks to promote as an essential and vital feature of co-operative activity. In order to avoid unnecessary misconceptions, it may be explained at the outset that this fund is not a tax or other fiscal imposition.[77] It is not a fund to which all registered co-operatives are obliged to contribute some annual fee, sum or percentage of turnover. Nor is it a variation of the compensation funds established under local and EU financial services rules and which are intended as a safety-net for investors.[78] It is actually a unique and simpler concept. Those co-operatives whose annual audited financial statements show a surplus contribute to the Fund to the extent of five per cent of such surplus. Consequently, only profitable societies fork out their five per cent, whereas those whose accounts disclose an absence of a surplus do not.

The Fund is established for specific purposes linked to the notion of solidarity between co-operatives. The objectives of the Fund echo the Co-operative Principles already discussed earlier. Article 86 of the 1978 Act had described these objectives as the *"furtherance of cooperative education, training, research, audit and for the general development of the co-operative movement in Malta"*.

The equivalent article in the 2001 Act is article 91 which has refined the original rule and is now much more detailed and comprehensive. It has clarified that the five per cent contribution is calculated on the basis of all sources of an eligible co-operative's income, including income from investments. For the first time, the Fund has been vested with separate legal personality. It is now specifically assigned responsibility for collecting sums due to it by societies eligible to contribute the five per cent of surplus. These provisions have resolved problems

provisions of the Commercial Partnerships Ordinance, or any enactment replacing it, do not apply to co-operative societies. It is not obvious why it was felt necessary to insert this provision in the first place, because Maltese law never said or implied that company law rules applied to co-operatives. The article possibly disclosed a lingering fear by its drafters that should the 1978 Act be found wanting or unclear in any respect, the relevant provision of the Ordinance would have been applied to co-operatives. The legislator evidently felt that this hypothesis had to be explicitly excluded.

The exclusion of company law as a possible reference point for co-operatives is perhaps broadly understandable. By and large, company law is more "capitalist" and profit oriented, tending to emphasise values incompatible with pure co-operative ideology. In company administration practice, one traces a bias towards individual personal property, profits and dividends, the acquisition of shares and the accumulation of voting rights and controlling powers. Company law has less regard for more generalised or collective interests, for solidarity among members and among the corporate entities themselves. These differences were deemed sufficient to make company legislation unsuitable as a possible point of reference for co-operatives law. Article 117 disclosed a certain allergy to company law.

Co-operatives are different

For both practical and academic reasons, a comparison between co-operative law and company legislation should prove interesting and educational. As a form of business organization, the co-operative offers an alternative to the limited liability company.[82] The question is whether the co-operative model has what it takes to offer itself as a

Slightly less than 120 co-operative societies have been set up and registered since 1947. At the time of writing,[81] about sixty co-operatives remain on the official register. A few of these may be barely operative. On the other hand, almost 38,000 private limited liability companies have been registered since 1965, of which about 22,000 are operative. It may be broadly stated that the 2001 Act is to the 1978 Act what the Companies Act of 1995 is to the 1962 Ordinance; not a radical departure or complete break with the past, but a further development and maturity of ideas and mechanisms based on the former foundations.

It would probably have been easier to compare the 1978 Act to the 1962 Ordinance. In 1978, both sectors and their respective legislation were in a somewhat similar or comparable stage of development. Even the laws were more or less of equal length and detail. The Companies Act 1995 appears to be in a league of its own; it is much more detailed, sophisticated and complex. After all, the 1995 Act deals with the most important business form in local practice. Its provisions reflect the very flexible nature, economic significance and needs of the company model which it regulates.

There is no intention here to imply that the 2001 Act is not itself a complex and sophisticated law which has responded well to the modern needs of the sector it supports and regulates. It may also be worthwhile noting that whereas the Companies Act was to a relevant degree inspired by and based on the UK Companies Acts, the new Co-operative Societies Act is almost entirely home-grown.

Article 117 of the 1978 Act

The very last article of the Co-operative Societies Act 1978, article 117, was a most puzzling section and in fact has not been retained in the 2001 Act. This article stated that the

(i) they share the concept of a "dividend", which is similar though not identical;
(j) the members' general meeting is the highest organ;
(k) both are required to maintain a register of members;
(l) the co-operative statute mirrors the Memorandum and Articles, and both share the trend towards document standardization;
(m) they share similar concerns relating to good corporate governance;
(n) the basic procedure for dissolution and winding up is similar, although the Board plays a more intrusive role than the Registrar;
(o) the possibility of investigations or enquiries by the Registrar applies also in the co-operative framework;
(p) the respective laws allow corporate reconstructions by way of mergers and conversions;
(q) in some countries co-operatives are regulated as a category of company law understood in a broader sense than is found in Maltese and UK law;
(r) at the European level, the *Societas Europaea* mirrors the concept of the *Societas Europaea Cooperativa*.

Differences

This part shall attempt to bring into sharper relief the difference between a co-operative society and a company by concentrating on concepts, structures and other features found in the co-operatives legislation with no parallel or equivalent in company law. This list of differences is illustrative rather than complete:

(a) Co-operative laws foresees a regulatory authority with extensive supervisory and powers of intervention and enquiry. The Co-operatives Board has wider and

truly credible and workable commercial alternative, in all instances.

Similarities

It would be simplistic and unduly bold to base important conclusions on a mere comparison between the individual articles of the 2001 Act and the provisions of the Companies Act 1995. But lists are often a useful exercise nonetheless.

Companies and co-operatives differ in many respects, concerning their social objectives, their structure and in the motivation underlying their regulation. Yet they clearly share several features. Even where common concepts or mechanisms are shared, the details may be quite different. The following is a tentative indication of the common ground:

(a) both constitute a form of business organization set up by persons who wish to associate to pursue some economic or other venture together;
(b) both forms of organization have been given a separate identity, a legal personality distinct from that of its members;
(c) incorporation is obtained by registration by a pubic agency and the fact is recorded in a publicly accessible registry;
(d) legal personality continues even during the winding-up and ceases upon being struck off the official register;
(e) the limited liability of the members is safeguarded;
(f) the committee of management mirrors the board of directors;
(g) both are obliged to keep proper books of accounts;
(h) both are obliged to appoint an auditor and to have their accounts audited;

company law only recognizes the board of directors, irrespective of the company's size or number of employees.

(i) The specific positive duty imposed on the auditor to notify the Board of any irregularities is not found in Company law.

(j) Nothing similar to the concept and functions of the Apex organisation and the Central Co-operative Fund are found in company law.

(k) The notion of patronage refund is unknown to company law.

(l) The Board's consent is required for the dissolution of a co-operative, in most cases. The Registrar's consent is never required for company dissolutions.

(m) The Board enjoys extensive powers concerning the appointment and supervision of a liquidator. No similar powers are assigned to the Registrar.

(n) Company law contains nothing similar to the notion of the Co-operative Societies Liquidation Account.

(o) Co-operatives have to satisfy certain conditions when seeking to establish subsidiary companies. Companies do not face similar restrictions.

(p) Co-operatives are not required to pay any fees to the Board other than a nominal initial registration fee.[84] On the other hand, companies pay substantial registration, annual and other fees to the Registrar.

Another potentially important distinction arises from Maltese fiscal legislation. Unlike companies, all co-operatives (and the Central Co-operative Fund) have been exempted from the payment of income tax. This may place co-operatives at some advantage over companies. The exemptions were issued under the Income Tax Act 1948[85] and not under the Co-operative Societies Act.

more varied regulatory powers of intervention than the Registrar of Companies.

(b) A co-operative requires a licence from the Board. The Registrar has no licensing power.

(c) The Board at its discretion (exercised reasonably) determines whether or not to register an applicant society. It examines the promoters' proposals and business plans. Company registration is more or less automatic once the formal documentation is correct, and the Registrar has no discretion to refuse applications except for submission of incomplete documentation. In practical terms, it is much swifter and easier to set up a company.

(d) Unlike co-operatives, companies do not undergo or enjoy the possibility of provisional registration, (though historically this was not always the case).[83]

(e) Co-operative promoters are obliged to appoint a formation committee to draw up a feasibility study, assess membership, and organize educational meetings.

(f) Co-operative law shows a marked preference towards individuals as members and establishes restrictions on corporate members.

(g) The duty of co-operatives to adhere to defined cooperative principles finds no parallel in company law. No set of principles or values govern the setting up of companies or the conduct of their controllers. Co-operative law stresses the principles of pursuing common interests, solidarity and one member/one vote, irrespective of shares held. The declaration of principles is one of the most remarkable distinguishing features.

(h) Co-operatives enjoy the choice of establishing a second-tier oversight supervisory board. Maltese

fill a void which companies might not always adequately satisfy. Particularly where promoters are seeking to carry on a joint enterprise with a structure promising a more integrated relationship between the members based on principles of equality and solidarity.

The more popular limited liability company model has overshadowed the co-operative in Maltese commercial practice, public perception and academic interest. Very clear similarities exist between a co-operative and a company and they share several common elements. However, sufficient differences allow them to remain conceptually and functionally distinct. The new Co-operative Societies Act 2001 has stressed, not reduced, these differences.

A judicious transposition to the co-operative model of some of the strengths and advantages of the private limited company should prove beneficial provided the exercise safeguards the special identity of the co-operative model and respects its history and distinct social function.[86]

A Note on the International Dimension

Cooperatives are not just a national phenomenon but have a highly developed international context with the involvement of huge international entities as the United Nations (UN),[87] the International Labour Organization (ILO)[88] and the International Cooperative Alliance (ICA).[89] The new Co-operative Societies Act has for the first time introduced an indirect link to the international dimension. We have already seen that this has been achieved by the adoption of a set of co-operative principles promoted by the ICA

The 2001 Act is silent on another important aspect of the international context, the European Union. The new Act was

Companies are different

For the sake of completeness, one may now attempt a reverse exercise and point to a number of concepts and possibilities found in the Companies Act, not reflected in co-operative legislation. These are but some of them:

(a) A private company may be set up as single member company; a co-operative requires at least five members.
(b) Company law recognises three different types of commercial partnerships having distinct liability implications.
(c) Company law allows a variety of structures, from the private company to the public company and the SICAV.
(d) Various forms of winding-up procedures, reconstruction and special recovery proceedings are available for companies which are insolvent or in financial distress. The co-operative law approach is to rely on the intervention and supervision of liquidations by the Board.
(e) Company law contains different and more detailed rules on divisions and mergers.
(f) The status and obligations of oversea companies are also dealt with in the Companies Act, as in the Ordinance before it. No such provision is made in the Co-operatives Societies Act.

The private limited liability company has proved by far to be the most popular form of carrying out business in Malta. Company registrations continue at a steadier pace. Companies are of course much more loosely regulated and may be set up much faster than co-operatives which are still obliged to follow a rather cumbersome formation procedure. Nonetheless, it is suggested that co-operatives

Resolution *"encouraged all governments to ensure a supportive environment in which cooperatives can participate on an equal footing with other forms of enterprise"*.[94]

A second EU measure is a directive - ***Council Directive 2003/72/EC of 22nd July 2003 supplementing the Statute for a European Cooperative with regard to the involvement of employees.*** This directive governs employee participation in co-operative societies. It sets out their rights to information and consultation. This too is modelled on a similar earlier directive applicable to companies.

Finally, the international dimension is now acknowledged in the 2002 regulations governing the Central Co-operative Fund, discussed earlier in this paper. Fund assets may now be allocated *"to support and intensify the participation of the Maltese co-operative movement in relevant organizations, activities and projects on an international level"*.[95]

An Assessment, a Conclusion and the Future

Inevitably, the co-operative form always finds itself compared to the limited liability company, and co-operative law continues to be compared to company law. Indeed, the Board policy document approved in October 1993 had highlighted the need to project co-operatives as *"an attractive legal alternative to the conventional limited liability company and partnerships"* and as *"attractive to other professional advisers who may recommend cooperative options to clients"*.[96] Will the co-operative form manage to extricate itself from the long shadow cast by the more popular company model?

Like most other areas of law, co-operatives legislation needs to evolve, absorb new concepts and to have an opportunity to refresh itself periodically. In this way, it may keep up with changing requirements of societies,

passed prior to EU membership which came three years later. It is not really within the scope of this paper to analyse EU law in this area. For the sake of completeness and to place the new Act within Malta's new EU obligations, a brief reference shall now be made to some relevant legislative developments.[90]

The first measure is ***Council Regulation (EC) No. 1435/2003 of 22nd July 2003 on the Statute for a European Cooperative Society (SCE).***[91] Being a Regulation, this measure has direct effect in the legislation of member states and requires no transposition measure. The model adopted follows closely the European Company Statute[92] model adopted by the EU some time earlier. The objective is simply to have a co-operative society recognized and able to operate in all member countries despite being incorporated in one member state. Differences in national rules in the Union on co-operative societies are considerable. In some countries co-operatives are regulated as an integral part of company law. Denmark which boasts of a significant co-operative movement belongs to a group of countries which have no special law on co-operative societies, but regulate them under general law. Italy and others deals with co-operative societies at least partially through its Civil Code. As we have seen Malta has a special law dedicated to co-operatives, distinct from both the Civil Code and the Companies Act.

The Council Regulation does not seek to super-impose a European model on all member states. Member states in fact retain competence over national laws regulating co-operatives. The rules on the European co-operative are intended to co-exist with the diverse national law rules on the setting up and regulation of co-operative societies.[93] Recital number 6 of the Regulation refers to the Resolution of the 88th Plenary of the General Assembly of the United Nations of the 19 December 2001 (A/Res/56/114). This

A somewhat similar process occurred in the company law field. By the early 1990's, much of the 1962 Ordinance had become out-dated and inadequate. It was eventually replaced in its entirety by the 1995 Act, a step that had been long overdue.

The 2001 Act also appears more outward-looking in its approach. It has considerably widened the scope for the establishment of new co-operatives and new corporate arrangements under which they may prosper. Co-operatives may have themselves partly to blame if bad press influences public perceptions about them.[98] Co-operatives need to properly exploit the more flexible opportunities and innovations offered by the new law, and, in a way, re-invent themselves. If this occasion is missed, public perception that co-operatives are frozen in time may be strengthened.

Will the 2001 Act prove a success? It is still too early to make a serious and objective assessment. This Act has sought to make Maltese co-operative law neater and more precise, removing some archaic rules and restrictions, and creating a more supportive and flexible framework for the further development and expansion of co-operative societies into wider areas of activity.

The 2001 reforms were a necessary step in the evolution of co-operative regulation in Malta. The new law is a more modern instrument permitting co-operatives to better compete with other business organizations in the private sector, and to respond efficiently to the tremendous changes that have occurred since 1979 in the local and global social, economic, technological, legal and political fields, and in public expectations. However, as in any other regulated sector, the law can at most provide a workable and supportive environment; it cannot also guarantee the commercial success and profitability of co-operatives.

members and major changes in public expectations and perceptions, local and foreign. This process should ensure that the co-operative model remains dynamic, attractive and competitive. The 2001 reform may be best viewed in this context.

There seems to be a broad consensus in Malta in favour of the proposition that co-operatives should be regulated by a special law. This culture still favours a public law approach through the establishment of a government-appointed and funded supervisory agency also doubling as registrar and serving as an intermediary between the operators and the state. It seems highly unlikely that strong support would be found for a suggestion that co-operatives should simply be regulated by the ordinary rules of law or that the Co-operatives Board should be done away with.

Was the 1978 Act a success? This Act offered a relatively neat and user-friendly framework that allowed co-operatives in Malta to flourish while being subject to firm and fair regulation. Although a product of its time,[97] the Act was a worthy measure and merits a broadly positive assessment. The 1978 Act is now consigned to history, but it still deserves academic attention. The 1978 law largely achieved its objectives and served the co-operative movement well.

The 2001 Act has followed quite closely the basic structure of the 1978 Act. This ensured continuity and avoided uncertainties and disruptions in the sector, especially during the change-over period. The new Act is however very different in many respects. A number of changes relate to substantial issues, others to detail; some are very evident while others are less obtrusive. It would certainly be a mistake to under-estimate the conceptual and practical relevance of the divergences. Few, if any, of the provisions of the 1978 Act remained unaffected by the 2001 reforms.

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12. 'Report of the Ministerial Committee on the Development of Economic Democracy in Malta', Malta University Print, 1993;
13. Shah, A., 'Cooperative law: An instrument for development?', International Labour Review, Vol. 131, 1992.

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5. Co-operatives Board, Directory of Co-operatives;
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7. Munkner, Hans-H., 'Report on the Promotion of the Co-operative Movement in Malta', prepared for the German Agency for Technical Cooperation Ltd, Marburg, April 1980. This comprehensive report is essential reading and deserves to be better-known. It provides extensive background to the drafting of the 1978 Act. An earlier version of this report, prepared in March 1976, laid the foundations for that Act and to the repeal of the 1946 Ordinance;
8. Munkner, Hans-H., 'Development Trends of Co-operative Legislation in European Union Member States', University of Marburg, 2000;
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Notes

1 The document had been approved by the Board at its sitting of the 12 October 1993. Several of the proposals contained in this publication have been implemented in the 2001 Act.
2 The Times, 6 July 1996.
3 On the 26 February 1999, The Times opened its unusually enthusiastic editorial with the flowery remark that *"Few things could ring more pleasantly upon the ear than the news that in the coming months the government plans to amend the law regulating co-operatives in order to encourage the formation of new ones."* The editorial ended on an equally optimistic tone: *"If the board is seen as an enabler rather than a paternalistic regulator of every little detail, it will be the economic catalyst it is intended to be."*.
4 The entire drafting exercise was driven all the way to fruition by the Board in conjunction with the strong political support of the then Minister for Social Policy, as well as in consultation, though not necessarily always in agreement, with the Apex representatives. The main drafters were the then Chairman, Prof G Baldacchino, who has written extensively on co-operative issues, and the writer, who served as Acting-Chairman of the Board.
5 See Dr Walter Cuschieri et vs Onor Prim Ministru, Constitutional Court, 30 November 1977.
6 Article 21 of the Constitution.
7 Chapter 386 of the Laws of Malta.
8. Article 3(3) of the 2001 Act.
9 Article 3(1)(c) of the 1978 Act.
10 Article 1(2) of the 2001 Act.
11 The entire Act was not brought into force at one go. Most provisions came into force on 16 April 2002, but thirteen provisions were delayed until 1 July 2002. This measure allowed registered societies sufficient time to implement the necessary adjustments to their statutes.
12 Article 111 (1) of the 2001 Act.
13 Article 111 (2) which safeguards the validity of *"any registration, authorization, approval, appointment, order, regulations or other action whatsoever made and issues by virtue of the repealed Act"*.
14 Soon after the new law was passed in 2001, the Board sent a circular on the subject to all co-operative societies on its register advising them of their need to review their statutes to bring them in line with the new Act.
15 See the ICA website for more useful information on co-operative principles and legislative policies and developments globally.
16 See the original formulation in article 21 of the Constitution. The improved formulation now found in article 21 (3) of the 2001 Act was initially developed in article 43 of the Consumer Affairs Act 1994, Chapter 378 of the Laws of Malta. This Act set out for the first time in Maltese law a declaration of "Consumer Rights", a context comparable to the declaration of co-operative principles.
17 Chapter 379 of the Laws of Malta.
18 The island became a member of the EU in May 2004.
19 Clearly, no similar provision could have been found in the 1978 Act

5. Fabri, D., 'The Historical Background: need for review of the legislation; overview of changes', address to the Seminar on the new Companies Act, organized jointly by the Malta Institute of Accountants and the Chamber of Advocates, 13 November 1995;
6. Fabri, D., 'The Evolving Role of the Registrar', address to the Seminar on the new Companies Act, jointly organized by the Malta Institute of Accountants and the Chamber of Advocates, 17 November 1995.

Some Useful Websites

1. www.coopsboard.org
2. www.ccf.org.mt
3. www.scoops.org.mt
4. www.msp.gov.mt
5. www.education.gov.mt/employment/coops/archives/coops
6. www.ica.coop
7. www.copacgva.org
8. www.fao.org.documents
9. www.ilo.org
10. www.mcba.coop/chisa
11. www.australia.coop
12. www.coopscanada.coo
13. www.co-opstudies.org
14. www.coopdevelopment.org.au
15. www.plunket.co.uk
16. www.usaid.gov

33 Article 71.
34 Article 78.
35 ibid.
36 ibid.
37 ibid.
38 Article 45.
39 See articles 67 and 69 of the 1978 Act.
40 Until rectified in 2003, a statement on the general duties of company directors was surprisingly and conspicuously absent from local regulation of company directors. The Companies Act was amended in 2003 (Act IV of 2003) for this purpose and a general statement has been inserted as article 136A.
41 Articles 83 – 85.
42 Article 85 (1).
43 Article 85(2).
44 New article 62 is equivalent to former article 55.
45 Article 66 (g) and (h).
46 Article 48.
47 Report of the Registrar of Co-operatives Societies for the year 1947-48, Department of Co-operatives, Valletta, 14 January 1949.
48 Article 39.
49 Article 18.
50 Article 31.
51 Article 49(4)(d).
52 Currently designated the Minister for the Family and Social Solidarity.
53 The Board consists of a chairman and up to six other members, qualified in terms of article 4, and appointed by the Minister responsible for cooperatives. See article 4.
54 This registry is now open to the public. See article 12. Regulations establishing fees for public inspection and for the production of copies were published in 2003 – (Legal Notice 198 of 2003).
55 Its latter role as promoter of the co-operative movement, though not entirely written off, has been somewhat reduced and, in practice, this role is now primarily undertaken by the Apex organization.
56 Article 17.
57 Co-operatives Societies (Establishment of Administrative Penalties and Sanctions) Regulations, 2003 – (Legal Notice 115 of 2003).
58 Article 3(1).
59 ibid.
60 ibid.
61 Article 94(1).
62 ibid.
63 Article 10(1).
64 Article 10(2).
65 Article 39(1) and 43.
66 Article 96(1).
67 Article 111(d).
68 Article 60 (4).
69 Article 79.

enacted sixteen years before Malta adopted its first ever law to regulate competition.

20 See articles 66 (4) and 45 (4) of the 1978 Act.

21 Remarkably, voluntary associations are still not subject to any special law in Malta. This constitutes a serious lacuna which however may be rectified in the near future following the publication of a White Paper "Strengthening the Voluntary Sector" in July 2005 by the Ministry for the Family and Social Solidarity. The White Paper included a draft bill which envisages the comprehensive regulation and supervision of associations and several other unregulated entities, and the appointment of a Commissioner for Voluntary Organizations. The documents may be accessed at www.mfss.gov.mt .

22 It is interesting to note that the original version of these two provisions formed part of the 1946 Ordinance. This had allowed an appeal in both instances to no less than the Governor himself. See articles 7 and 9 of the 1946 Ordinance.

23 Article 4.

24 See new articles 36 and 109.

25 Established by Part II of the Arbitration Act, 1996, Chapter 387 of the Laws of Malta.

26 The Malta Business Weekly of 1-7 August 1996 under the heading *The Courts or the Co-operatives Board?* reported a decision taken on 11 July 1996 by the First Hall of the Civil Court in a case instituted by Ghaqda Koperativa tas-Sajd Limited (a fishing co-operative) against one of its members, C. Gafa. The court accepted defendant's plea that it had no jurisdiction in the case as disputes between a society and a member were reserved by the 1978 Act for decision by the Board. Interestingly , the court quoted from the relative Parliamentary debates during which the Minister piloting the then 1978 Bill had stated (in translation) : *"We want as far as possible to remove such issues from the Law Courts and channel them to the Co-operatives Board, that is the special board established to decide upon such matters…"*. The judgement was confirmed in later cases, including Ghaqda Koperativa tas-Sajd Limited – vs – Tony Carabott where the same court, differently presided over, too lightly (and in the writer's view, erroneously,) considered the Board a *"special tribunal"*.

27 Article 26.

28 See article 5 of the Ordinance.

29 In line with the 12th EU Company Law Directive, 89/667/EEC, a private company may now be set up as a single member company. See article 212 of the Companies Act.

30 Article 2 provides a definition of *subsidiary company*.

31 See *inter alia "First government cooperative set up"*, The Times, 3 September 1996; *"Public sector cooperatives scheme under review"*, The Times, Business, 14 January 1999; and *Public Sector coops: the best of both worlds"*, G Baldacchino, The Malta Independent on Sunday, 19 May 1996.

32 Ordinary co-operatives cannot now exceed eighteen months under provisional registration. The rules on the provisional registration of societies were not substantially revised in the 2001 Act. Compare article19 of the 1978 Act to article 28 of the 2001 Act.

88 International Labour Office Recommendation 193: "Promotion of Cooperatives". The ILO has a specialized branch which deals with cooperatives and cooperative law developments. A database of cooperative laws has been set up. Malta's 2001 law may be found there.

89 The ICA is an important part of the international cooperative movement network and a vital point of reference. Its useful website is accessible at www.coop.org. The national member for Malta is the Apex Organization of co-operatives. The ICA and the ILO collaborate closely. They signed a memorandum of understanding in February 2002.

90 See generally, Felice Pace J., Facing the challenges of globalisation; co-operative enterprise in an EU context, The Sunday Times, 2 March 2003, and "Is-Socjetà Koperattiva Ewropea qrib li ssir realta", Koperattivi, newsletter published by the Central Co-operatives Fund, April-June 2005.

91 The *Societas Cooperativa Europaea* (SCE).

92 The *Societas Europaea* (SE), Council Regulation (EC) No 2157/2001of 8th October 2001 on the Statute of the European company.

93 EUROPE news Bulletin, No. 8460, 13 May, 2003.

94 See also Report of the Secretary-General on the "Status and Role of co-operatives in the light of new economic and social trends" to the 44th session of the General Assembly on the 23rd December 1998. The Report provides an interesting discussion on co-operative legal structures and an overview of international developments and changes in co-operative law in various countries.

95 Regulation 3(1)(g).

96 No. 1 above.

97 A time of intensive state intervention and centralization, evidenced by wide ministerial powers.

98 Regrettably, co-operatives generally suffer negative public perceptions. Except for persons and professionals who work in the sector, co-operatives are broadly perceived as an unfashionable subject for discussion. They also tend to get a bad press. During the past few years co-operatives have frequently been in the news; often for the wrong reasons. Many reports have featured co-operatives in financial or operational difficulties. Numerous newspaper and television reports throughout the first two weeks of August 2002 and again in 2005 covered the serious problems faced by the Koperattiva Indafa Pubblika Limitata (KIP). See "Gonzi issues stern warning to cooperative", The Times, 16 July 2003. (See also report in The Times, 18 February 2005 on same problem.

70 Articles 81 (1) and 82 (3).

71 Article 80 (3).

72 Article 83.

73 Article 99(2).

74 Article 109.

75 Article 27 (3).

76 Article 111 (a) and (b).

77 Unfortunately, co-operatives eligible to contribute to the Fund often do so reluctantly. In one particular case, payment claimed by the Board in favour of the Fund was contested on technical grounds and delayed for several years until the issue was finally determined by recourse to arbitration. During the arbitration proceedings, the co-operative tried to argue that the 5% contribution to the Fund was just another tax imposition burdening the society. The award was given against the co-operative.

78 These include the investors and bank depositors compensation schemes fund by contributions made by licensed firms. Unpaid investors of an insolvent firm may claim at least partial recovery of their loss. See the Investor Compensation Scheme Regulations, 2003-(Legal Notice 368 of 2003), and the Depositor Compensation Scheme Regulations, 2003-(Legal Notice 369 of 2003).

79 Co-operative Societies (Central Co-operative Fund) Regulations, 2002 - (Legal Notice 108 of 2002).

80 Ordinance X of 1962.

81 February 2006.

82 In his provocative article *Cleansing the co-operative* in the Malta Independent on Sunday, 6 June 1999, Dr Baldacchino discusses five *myths* about co-operatives, including one reading ***"Co-ops are not that different from companies."*** He admits that: *"This is a tricky one....".*

83 In an interesting lesson from the past, provisional registration is not unknown in the history of company law. The (UK) Joint Stock Companies Act 1844, (which also created the office of the Registrar of Companies), had introduced a rather cumbersome registration procedure, consisting of two stages, provisional and complete registration. *"A provisional registration for a few preliminary purposes was followed by a complete registration, and only when the latter was completed did the company acquire corporate status."* Palmer's Company Law, 24th Edition, vol 1, 1987 (C Schmitthoff - General Editor). The Joint Stock Companies Act 1856 removed this cumbersome procedure and *"made the formation of a company a simple and inexpensive process."* (Palmer ibid)

84 Co-operative Societies (Levying of Fees) Regulations, 2003 (Legal Notice 198 of 2003).

85 Chapter 123 of the Laws of Malta.

86 Prof H. Munkner has cautioned against the trend of treating co-operative members as customers or shareholders as this weakens co-operative societies rather than strengthen them. See Hans-H. Munkner, *Co-operative Principles and Values – Developing Co-operative Societies in a Globalised Economy*, Malta Co-operative Day address, 5 July, 2003.

87 See United Nations Guidelines on Cooperative Development 20010 elaborated in cooperation with COPAC.