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van der Sangen, Ger

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THE PRINCIPLES OF EUROPEAN COOPERATIVE LAW AND THEIR IMPACT ON FUTURE LAW-MAKING ON COOPERATIVES. THE CASE OF THE NETHERLANDS

Dr. Ger J.H. van der Sangen[1]
Tilburg Law School
Netherlands

1. Introduction

The concept of the cooperative as an organizational model has gained renewed attention from practioners, policymakers, legislators and academia over the last decades, culminating in the United Nations' proclamation of 2012 as The Year of the Cooperative. After years of relative silence on cooperative law, questions were raised about the adequacy of the legal infrastructure of cooperatives. Did the existing legal frameworks facilitate and foster the creation of cooperatives or are they hampering the establishment and growth of cooperatives? Legal aspects of cooperatives have been paid more and more attention, notably in the field of business organizational law, tax law and competition law. Also new challenges and innovations in the use of the concept of the cooperative lead to a necessity to adjust legal rules on cooperatives, for example with regard to renewable energy cooperatives, credit unions and the use of cooperatives in the platform economy. These events were accompanied by the reemergence of the cooperative movement and the creation of social economy initiatives, which have been actively promoted by the European Union and have led in several member states to concrete policy instruments, legal measures and inducements to promote businesses in the social economy.[2]

A common denominator in all of these developments is the pivotal and quintessential question of what a cooperative is. In fact, although the cooperative both as an organizational form and as a legal construct has existed for more than 150 years – since the establishment of the Rochdale Equitable Pioneers in 1844 –, the legal debate on the specific nature and identify of the cooperative vis-à-vis investor-owned firms is still ongoing. A number of more recent publications in this field have already advanced our insights in the matter.[3] Yet, it appears that policymakers, legislators and in some cases the judiciary lack a proper understanding of the rationale of the concept of the cooperative and its legal nature. This article will demonstrate this claim by examining the cooperative law in the Netherlands. I will compare and contrast the key features of cooperative law in the Netherlands with *'The Principles of European Company Law'* (hereinafter: PECOL). This article submits that the PECOL will have an

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[1] Dr Ger J.H. van der Sangen is an Associate Professor Company Law and Securities Law at Tilburg Law School, Department Business Law. This articles builds on the autor's presentation at *The 2nd International Forum on Cooperative Law*, in the session on 'The harmonization and unification of cooperative law at national, regional and international level' , Athens 26 – 28 September 2018

He would like to express his gratitude to all the participants during this session for sharing their insights and discussions.

[2] See for an elaborative overview T.J. van der Ploeg e.a. (eds.), *Civil Society in Europe. Minimum Norms and Optimum Conditions of its Regulation*, Cambridge University Press, Cambrigde 2017.

[3] See for example A. Fici, 'The Essential Role of Co-operative Law and Some Related Issues', in: J. Mitchie e.a. (eds.), *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business*, Oxford University Press, Oxford 2017, p. 539-549.

important impact on pinpointing and developing the characteristics of the specific nature and identity of the cooperative vis-à-vis investor-owned firms and are useful guidelines for legislators in developing new cooperative laws.

The outline of this article is that in part 2, I will describe the PECOL-project focusing on its objective and its methodology. In part 3, I address the question how the PECOL fit into the existing framework of legal principles and norms of European Cooperative Law. In part 4, I will discuss the PECOL with regard to the definition and objectives of cooperatives, the cooperative governance, the cooperative financial structure, the cooperative audit and the cooperation among cooperatives, following the five core building blocks of the PECOL. While addressing these topics, I will compare and contrast the PECOL with the current state of affairs with regard to cooperative law in the Netherlands.[4] Part 5 concludes.

2. The PECOL-project

2.1 General remarks

The PECOL are the result of the research project of the Study Group on European Cooperative Law and as such presented in the book *Principles of European Cooperative Law. Principles, Commentaries and National Reports'* by Fajardo, Fici, Henrÿ, Hiez, Meira, Münckner & Snaith (2017).[5] The starting point of drafting the PECOL was the cooperative law statutes of six member states. In alphabetic order: Finland, France, Italy, Germany, Portugal, Spain and the United Kingdom. Also reference is made to the SCE Statute[6] as a restatement of European Cooperative Law reflecting a certain *acquis communautaire*. While taking this approach, the Study Group has created the foundations to determine common principles and legal norms that generally underlay national cooperative law statutes. The question may arise whether the selected sets of cooperative legislation reflect cooperative law of all member states of the European Union. In this respect, the drafting of PECOL has been an ambitious project given the fact that cooperative legislations in the EU are highly path-dependent.[7] However, drafting the PECOL is the first project to produce a more comprehensive and detailed set of legal principles and norms that legislators, co-operators, policymakers and scholars could use to discuss the essentials and basic legal features of the cooperative as a legal business form. The PECOL could also

[4] See for a description of Netherlands' cooperative law: G.J.H. van der Sangen, 'Cooperative Law in the Netherlands', in: D. Cracogna, A. Fici & H. Henry (eds.), *International Handbook of Cooperative Law*, Berlin: Springer Verlag 2013, pp. 541-561.

[5] G. Fajardo et.al. (2017), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge – Antwerp – Portland: Intersentia 2017, firstly reviewed by G. Miribung, in: *International Journal of Cooperative Law*, Issue I, 2018, pp. 191-197 (www.iuscooperativum.org).

[6] Council Regulation (EC), No 1435/2003 of 22 July 2003 on the Statute of a European Cooperative Society (SCE), OJ L 207/1 of 18 August 2003, entered into force as of 18 August 2006. The Regulation is accompanied by Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207 of 18 August 2003.

[7] Vide the evolution of the SCE-Statute in the 2010 Euricse Report on the implementation of the SCE-Statute and G.J.H. van der Sangen, *Support for Farmers' Cooperatives. An EU Wide Comparative Analysis of Legal Aspects of agricultural cooperatives*, Wageningen University 2012 and G.J.H. van der Sangen, 'How to Regulate Cooperatives in the EU? A Theory of Path Dependency', *Dovenschmidt Quarterly*, December 2014, pp. 131-146.

provide the building blocks to draft model statutes as an inspiration how to set-up cooperatives. The PECOL apply to two types of cooperatives: the traditional mutual cooperative and the emerging general interest cooperative. In this respect, there is a demand for further research into the question whether two set of principles and model statutes are required: one for the traditional mutual cooperatives and one for the new wave of general interest cooperatives. In this article, the idea is supported that – while the history of top-down law-making on cooperatives in the EU has contributed to the complexity of cooperative laws with path-dependent differences – the PECOL have the potential of overcoming the existing path-dependency on cooperative law-making.

2.2 Methodology

As said above, the starting point of the PECOL are the cooperative legislations of six EU member states that might be representative for cooperative law in the EU. Also, the Study Group referred to the SCE Statute as a restatement of European Cooperative Law reflecting a certain *acquis communautaire*. The question may be raised whether the specific selection of cooperative laws by the Study Group and the addition of the SCE Statute as a point of reference represent 'cooperative law' of *all* member states of the European Union. The authors acknowledge that the search for common principles in this respect has been a highly path-dependent activity and – to a certain extend – arbitrary. Earlier research showed that the harmonization of cooperative laws in the EU or its approximation by means of the introduction of the SCE Statute has been rather trivial.[8] However, from a comparative perspective the approach of the Study Group is justified since their objective is not to design *ex novo* an ideal prototype legal structure of cooperative legislation but rather exploring and identifying common principles that underlie cooperative law that could be used as guidelines for future law-making. The PECOL itself are not by any means intended to create cooperative laws taking over the role of the legislator. At best, according to the Study Group, the PECOL are soft law. Also, in my view, the selected jurisdictions reflect the diversity of the present legal frameworks of cooperative law in the EU, since families of legal traditions in cooperative law-making are taken into account. In this respect, the Study Group used a functional approach to comparative law with regard to exploring and identifying PECOL, however based on the doctrinal descriptions of cooperative law in the selected EU member states.[9]

2.3 Objectives

Reading the PECOL and their commentaries, one might wonder what the societal necessity exactly was for drafting a set of Principles of European Cooperative Law. Were there shortcomings in applying cooperative law in practice that needed to be addressed urgently? The Study Group has drawn-

[8] See the 2010 SCE-Statute Evaluation Report, *o.c.*, footnote 7.

[9]See R. Michaels, 'The Functional Method of Comparative Law', in: R. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford 2018, p. 340-380. According to R. Michaels, functionalist comparative law is factual as it focuses not on rules as such but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, legal systems are compared by considering their various judicial responses to similar situations. The functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. The functionality of law itself serves as means of comparison meaning that institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems. See for a functional approach to corporate law R. Kraakman et.al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, third revised edition, Oxford University Press, Oxford 2017.

up principles of European Cooperative Law that are primarily restricted to business organizational law aspects. Tax law, competition law, the role and involvement of employees in cooperatives, for example, have not been addressed. According to the Study Group, these questions 'are (…) very important, but depend so much on national jurisdictions that it is impossible, so far, to draw general conclusions.'[10] Although the literature demonstrates that cooperative law statutes of the EU member states are path-dependent as well,[11] there is common ground to identify PECOL from a business organizational law point of view. At the same time, we witness an undeniable new wave of appreciation of the cooperative in the EU triggered by the economic crisis and the policy agendas of global and European institutions, like the United Nations, the International Labour Organisation, the International Cooperative Alliance, the European Commission and the Court of Justice of the EU. In the Paint Graphos-case,[12] the CoJ EU specifically referred to the principles of cooperative law, deriving them from ILO Recommendation No. 193, the 1995 ICA Principles, the Communication of the European Commission on the promotion of Cooperatives and the Preamble of the SCE-Statute. We have to bear in mind that the Paint Graphos-case was a specific tax case and the social dimension of the cooperative and the concept of solidarity and mutuality were used by the court to construct a line of arguments in which the tax treatment of this specific type of cooperative was not considered to interfere with the EU rules for state aid. While doing so, the court laid down the legal principles for mutual cooperatives that operate not solely based on economic rationales and do not act as pure economic profit centres, but include elements of solidarity and mutuality element.[13]

That is not to say that in other fields of law, legislators fully grasp the legal nature and identity of the cooperative. For example, EU competition law and its application by the European Commission and the CoJ EU also reflects on the nature of cooperatives, yet not in a particularly facilitating way. Only for agricultural cooperatives are cooperative enterprises treated with some leeway under strict conditions, but cooperatives are not generically exempted from the application of competition law, irrespective their different character and identity from investor-owned firms. The starting point in EU competition law is that cooperatives are viewed as enterprises like any other that are able to influence competition.[14]

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[10] Fajardo et.al. (Eds.), *o.c.*, footnote 5, p. 5. In this respect, a recent study concluded with regard to agricultural cooperatives that these cooperatives in the 28 EU member states did not encounter significant legal problems establishing and maintaining cooperatives from a business organizational law point of few. The problems agricultural cooperatives encountered where mainly found in the field of taxation and the application of national and European competition law. In both tax law and competition law, because of the fact that the specific legal nature and identity of the cooperative and its characteristics vis-à-vis investor owned firms are not (adequately) taken into account by the legislator. See G.J.H. van der Sangen, *Support for Farmers' Cooperatives. An EU Wide Comparative Analysis of Legal Aspects of agricultural cooperatives*, Wageningen University 2012.

[11] G.J.H. van der Sangen, 'How to Regulate Cooperatives in the EU? A Theory of Path Dependency', *Dovenschmidt Quarterly*, December 2014, pp. 131-146.

[12] Court of Justice EU 8 September 2011, Joint Cases C-78/08 (Ministero dell'Economia e delle Finanze en Agenzia delle Entrate versus Paint Graphos Soc. coop. arl), C-79/08 (Adige Carni Soc. coop. arl, in liquidation versus Agenzia delle Entrate en Ministero dell'Economia e delle Finanze (C-79/08) and C-80/08 (Ministero delle Finanze versus Michele Franchetto).

[13] See for the requirements of the cooperative based on solidarity and mutuality the analysis of A. Fici, 'The European Cooperative Society', in: D. Cracogna et.al. (eds.), *International Handbook of Cooperative Law*, Springer Verlag, Berlin 2013, pp. 122-125. See also G.J.H. van der Sangen, 'De rol van principles in het coöperatierecht' (The Role of Principles in Cooperative Law), *Tijdschrift voor Ondernemingsbestuur* 2019-2, pp. 36-43.

[14] See Van der Sangen, *Support for Farmers' Cooperatives Report* 2012, p. 30-39 and A. Gerbrandy & S. de Vries, *Agricultural Policy and EU Competition Law. Possibilities and Limits for Self-Regulation in the Dairy Sector*, Eleven International Publishing, The Hague 2011, as well as the European Commission, DG Competition, *The interface between*

Since the focus of the PECOL is on business organisational law, it might be useful to elaborate on the objectives of business organisational law in general and to examine whether these objectives are at odds with the objective of cooperatives and cooperative law. The objectives of business organizational law listed below are well founded in the *law & economics* literature[15] and have been the dominant approach of the EU and national legislators on listed companies and private companies limited by shares. The main objective of business organisation law according to the law & economics literature is to facilitate entrepreneurship by providing off the rack legal business forms, in order to lower transactions costs in setting-up and maintaining a legal business entity, to lower the costs of solving potential agency problems, to offer default rules in case end-users are not in the position to ex ante contract for optimal provisions, and to safeguard the protection of minority members and other stakeholders as well as to prevent the abuse of the legal business form. The underlying objective of this approach of business organizational law-making is efficiency, lowering the internal and external costs of business organizations.

However, designing business organisation law for cooperatives as a legal business form from a transaction and agency costs perspective could be too narrow an approach to grasp the potential of cooperation in a cooperative since efficiency and profit-seeking are not an objective in itself but a means to an end in a cooperative. Cooperatives are about efficiency on the one hand and solidarity and mutuality at least between members on the other. It is in this respect that the Study Group choose a different approach on 'law-making' while drafting the PECOL. The question whether cooperative laws should mandate to encapsulate other interests than the pure economic has been answered by the Study Group confirmatively. Although the ultimate decision to encapsulate other interests than pure economic interests of its members is for the incorporators of the cooperative to decide, the cooperative and cooperative law in view of the Study Group are normative concepts that are reflected in the scope of the PECOL.

The scope of the PECOL is the traditional, economic mutual cooperative as well as the cooperative with a more societal objective. The PECOL reflect the operations of the first type of cooperatives, notably producer and supply cooperatives of entrepreneurs and farmers or even large cooperative banks. However, the PECOL contain the same aspiration as the 1995 ICA Principles and are based on the principles and values of the ICA. In practice, not all producer cooperatives adhere to these ICA Principles, because not only are the ICA Principles not legally binding for these cooperatives, but also from an economic point of view, they are not considered in all circumstances efficient for the enhancement of the performance of the cooperative and the income position of the *existing* members.

The Study Group did not draft principles specifically designed for the cooperative with a societal objective, - e.g. for general interest cooperatives – setting them apart from the case of the mutual or entrepreneurial cooperative. This choice is justifiable, for two reasons. Drafting principles specifically for general interest cooperatives leads to additional legal questions of demarcation and definition vis-à-vis associations. The second reason is that, since the PECOL do not mandate but facilitate cooperatives with

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EU competition policy and the Common Agricultural Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector, working paper, Brussels 16 February 2010, pp. 1-31 and the European Commission, DG Competition, *How EU Competition Policy Helps Dairy Farmers in Europe*, Questions & Answers, 16 February 2010.

[15] R. Kraakman et.al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, third revised edition, Oxford University Press, Oxford 2017, J.A. McCahery & E. Vermeulen, Corporate Governance of Non-Listed Companies, Oxford University Press, Oxford 2008 and P. Essers et.al. (eds.), *Reforming the Law on Business Organizations. Back to Basics in Business Law and Tax Law*, Eleven International Publishing, The Hague 2011.

a societal objective, the PECOL leave the autonomy of the incorporators of the cooperative untouched, save for those member states were the national cooperative law already mandates that all cooperatives must have a social dimension (which is the case in Italy and Portugal). Whether a cooperative has an entrepreneurial, income generating, pure economic, profit generating objective or a societal objective, is left to the freedom of association and the autonomy of the incorporators. If the incorporators choose the latter objective, of course, the principles could function as principles and best practices while at the same time there is already a legal infrastructure available to treat this type of cooperative with an articulated societal objective differently than the pure entrepreneurial cooperative. I would like to refer to legislation in Belgium and Italy as well as to the opening that the *Paint Graphos*-case provides for tax incentives. On the other hand, it is not for the benefit of the members of an entrepreneurial cooperative – with an articulated economic function in their bylaws – to be in any way mandated to adhere to the 1995 ICA-principles or the principles at hand. If all cooperatives were legally defined as not-for-profit – like the PECOL explicitly do –,[16] the entrepreneurial cooperative would be left out of the equation and this would not contribute to the acceptance of the PECOL in cooperative practice, for it places the entrepreneurial cooperative outside the scope of the PECOL.

This is not to say that a cooperative could not apply the principles, which members even can rely upon in court if a cooperative has encapsulated them in its bylaws or if they function as self-regulatory codes of principles and best practices, similar to corporate governance codes. If a cooperative complies with them – at least in the Netherlands –, members can rely upon them in court and they become 'the law' for the cooperative, alongside to cooperative law, the bylaws and passed resolutions of the competent bodies.[17]

Overall, the question remains what role the PECOL have or should have in relation to the function of business organizational law of cooperatives. Is it primarily to facilitate cost-efficient business forms and secondly to address minority and creditor protection (like in the dominant law & economics approach) or do the PECOL play a role in imposing top-down societal standards (the more normative approach)? Who is the addressee of the principles? What are the incentives for the legislature to consider these principles while reforming their national cooperative law? In this respect, it is worth mentioning that the European Commission is not planning further action in the field of revising the SCE Statute at this moment.

The Study Group has elaborately explained what the reasons are to introduce PECOL.[18] These reasons are compelling and – in my view – must be read in conjunction to each other. The Study Group underlines that, although the 1995 ICA Principles are broadly accepted as guidelines for how cooperatives could (or: should) operate and to a certain extend already express the specific characteristics and modus operandi vis-à-vis investor owned firms, the ICA Principles are too general and too descriptive to be used as legal norms and do not provide legal principles, norms and rules. Second, as already pointed out above, the existing legislation is highly path-dependent, lacking a proper overall definition of the cooperative as a legal business form and its specific legal identity. In this respect, the Study Group refers to the

[16] See the comments in paragraph 4.1 of this article.

[17] Of course, in the hierarchy of sources of cooperative law, the applied principles in the bylaws may not contravene the existing statutory cooperative law.

[18] Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 8-15.

phenomenon of 'companisation of cooperative law'.[19] Third, the ICA Principles need to be translated into normative legal principles to create a body of cooperative law as an autonomous field of law. [20] The ultimate objectives of the PECOL are, according to the Study Group, to help to pinpoint the legal identity of cooperatives distinct from 'companies' (investor owned firms), to provide a legal framework or pattern for other enterprises, notably in the social economy, and to provide a tool to enter into academic debate.

3. PECOL and the Framework of European Cooperative Law

One of the quintessential ideas behind the PECOL is that the PECOL fill in a gap between general cooperatives principles on the one hand and concrete legal norms and rules for cooperatives as a specific legal business form distinct from 'companies' on the other. At the top of the hierarchy of sources of European Cooperative Law are the 1995 ICA Principles of Values as well as ILO Recommendation No. 193. ILO Recommendation No. 193 mandates members of the ILO to adhere to the ICA-Principles and Values, [21] but also to take concrete steps to implement an adequate legal framework for cooperatives bases on the ICA Principles and Values.[22] Although the SCE Statute was not very successful in approximating the national cooperatives laws of the EU member states and its harmonizing effect was rather trivial, the SCE Statute also embodies the principles and values of the ICA Principles.[23] However, despite its character of directly binding legal rules as a regulation, the SCE Regulation needed implementation into national cooperative laws. Apart from that, the SCE Statute does not apply to cooperatives that are not established as an SCE. At best, in case a cooperative has been established under a national cooperative law, the SCE Statute could be used by the judiciary as a point of reference to interpret the national cooperative law, the bylaws and resolutions of the cooperative, as was the case in *Paint Graphos*.[24] However, the PECOL could also be used – within the existing hierarchy of sources of cooperative law – as a tool or framework for incorporators and members to design and adjust the articles of association or bylaws of the cooperative. Also they could be used for designing cooperative governance codes.[25] The future will establish where the PECOL will fit in the hierarchy of sources of cooperative law. The aim – of course – is that the PECOL should evolve into generally accepted legal

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[19] D. Hiez, 'Introduction', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 13. See also H. Henrÿ, 'Trends and Prospects of Cooperative Law, *International Handbook of Cooperative Law*, 2013, p. 809.

[20] H. Henrÿ, 'Trends in Cooperative Legislation: What Needs Harmonizing?', *Journal of Research on Trade, Management and Economic Development*, Vol. 5, Issue 1(9), 2018, p. 7-16.

[21] The addressees of the ILO Recommendations are the countries affiliated to the ILO. See H. Henrÿ, 'Public International Cooperative Law', *International Handbook of Cooperative Law*, Springer Verlag, Berlin 2013, p. 65-88.

[22] Article 6, ILO Recommendation No. 193: 'A 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 (…).

[23] Preamble 10 to the SCE Statute.

[24] Court of Justice EU 8 September 2011, Joint Cases C-78/08 (Ministero dell'Economia e delle Finanze en Agenzia delle Entrate versus Paint Graphos Soc. coop. arl), C-79/08 (Adige Carni Soc. coop. arl, in liquidation versus Agenzia delle Entrate en Ministero dell'Economia e delle Finanze (C-79/08) and C-80/08 (Ministero delle Finanze versus Michele Franchetto).

[25] Both the UK and the Netherlands are in the process of adjusting the existing governance codes for cooperatives.

principles of cooperative law with legal merit on their own, like the principle of good faith, duties of care etc.

4. Discussion on the PECOL[26]

4.1 Definition and objectives of cooperatives (Chapter 1)

A cooperative is defined as a legal person that carries on any economic activity *without profit* as the ultimate purpose (article 1.1.1.). 'Profit' as the ultimate purpose means making profit mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the cooperative or any other person (article 1.1.2). This principle intends to set the cooperative apart from investor-owned firms barring refunds or distribution on capital invested.

However, it is not clear how the principle relates to those cooperatives that have designed structures of self-financing to pay to members but also to investors a return on their investment in the equity of the cooperative. Cooperatives are searching for innovative ways to attract equity,[27] while maintaining the primary function for their members in the patronage relationship. All these innovative techniques involve the establishment of a patronage relationship based on market prices, which results in a profit for the cooperative. Members are commonly obliged or invited to provide additional equity funding to the cooperative and their equity stake is commonly related to the volume of their patronage. That will subsequently be the basis for the payment of a dividend. Although not a refund in the traditional way, this is still strongly related to the volume of patronage. This type of cooperative would not fall within the scope of the definition of mutual cooperatives in the PECOL.

According to article 1.1.3, cooperatives are allowed to use subsidiaries, but only if this is necessary to satisfy the interests of the members and the members of the cooperative maintain ultimate control of the subsidiary. The question is, however, who decides whether using a subsidiary is in the interest of the members, the general meeting or the board of directors. Ultimate control probably means that the cooperative has full control over the subsidiary. In this respect, it is more important to point out that the idea behind the principle reflects that the subsidiary has a key function in the settlement of the patronage relationship between the using members and the cooperative. If the latter is the case, the question is what position of the Study Group takes on the use of subsidiaries that have no part in managing or settling the patronage relationship. It is quite common for producer cooperatives to have also separate subsidiaries with diversified activities. For example, in the case of the Dutch dairy cooperative Friesland Campina, the existing member farmers invested over decades in the cooperative that operates as a holding cooperative that runs on behalf of its members internal branches and subsidiaries. Part of these subsidiaries are involved in the daily settlement of the patronage between the members and the cooperative, the other part of the subsidiaries are engaged in producing special products and non-dairy related products to expand the portfolio to gain a better bargaining position with retailers and to compensate for periods when milk prices are under pressure. From a tax point of view, these cooperatives

[26] Below, I will present comments on the PECOL itself. However, due to restrictions in pages of the article, I confine myself to the most important principles. Of course, the choice is arbitrary.

[27] See C. Iliopoulos, 'Ownership, Governance and Related Trade-Offs in Agricultural Cooperatives', *Dovenschmidt Quarterly* 2014-4, p. 159-167 with further references. See also G.J.H. van der Sangen, *Rechtskarakter en financiering van de coöperatie*, W.E.J. Tjeenk Willink 1999, Chapter 6 with a summary in English.

are treated in the Netherlands as investor-owned firms for this part of the cooperative group, but these activities are very important for the overall performance of the cooperative and therefore for the income position its members. Netherlands' cooperative law does not generically prohibit the use of subsidiaries in this way.[28]

With regard to membership requirements, the PECOL distinguish between cooperator members and non-cooperator members. Cooperator members are the members who engage in cooperative transactions with the cooperative according to article 1.3.2. The minimum of cooperator members is two. In this respect, the cooperative has an associational character. A single member cooperative, therefor, is not a cooperative. Although according to Netherlands cooperative law, a single member cooperative is legally permissible, it results in artificial cooperatives that should not be allowed by cooperative law. Until 1 January 2018, single member cooperatives were used in the Netherlands mainly for tax purposes to avoid Dividend Withholding Tax as cooperatives were generically exempted from Dividend Withholding Tax. As of 1 January 2018, the abuse of the cooperative form resulted in tax measures to avoid tax evasion by using cooperatives, notably by abolishing the general exemption for cooperatives in the Dividend Withholding Tax.[29] However, the Netherlands Civil Code (hereinafter: NCC), Title 3, on Cooperatives has not been revised on this issue.

Article 1.3.6 gives a principle on the restrictions to membership that the restrictions must be reasonable and non-discriminatory. In the commentary to this principle, it is explained that the open door principle of the 1995 ICA Principles does not impose any obligation on the cooperative to accept everyone who applies to join as a member.[30] In this respect, it is worth mentioning that the concept of the cooperative to a certain extent has an associational character. Yet, whether the associational character to organise potential members leads to a mandate to accept potential members depends highly on national cooperative law. For example, Netherlands cooperative law emphasises the associational character of the cooperative, but only with regard to the existing members. According to article 53, section 3, Second Book, NCC, a cooperative is only allowed to enter into transactions with members and is under no obligation under cooperative law to accept new members unless the articles of association provide otherwise.

With regard to the principle of equal treatment of co-operator members, the question arises whether equal treatment also includes the principle of proportional treatment to the extent of the volume of the patronage between a member and the cooperative. In the commentary to article 1.4.2, this issue has not been addressed, but it is highly relevant, because it has also an impact on the question whether under PECOL it is allowed to deviate from the one member, one vote-principle. Proportionality to the extent of the patronage is considered fair in producer cooperatives as a benchmark for equal treatment, taking into account the individual effort of a member. This principle is the mirror-image of the principle in article 1.4.3, that members should to a minimum extent and/or level participate as co-operator members in their cooperative, leading to a reason of member expulsion in case of non-compliance.

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[28] G.J.H. van der Sangen, 'The Netherlands', in: D. Cracogna et.al. (eds.), *International Handbook of Cooperative Law*, Springer Verlag, Berlin 2013, p. 546 and 557.

[29] See on this matter M. Beudeker & E. Kastrop, 'Fiscaliteit & de coöperatie', in: Beudeker/Nijland & Zaman, *De coöperatie anno 2017*, Ars Notariatus nr. 166, Wolters Kluwer, Deventer 2017, p. 11-28.

[30] See also Article 2.2.3 and Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 51.

Article 1.5.5 gives guidance how a cooperative is able to manage transactions with non-members. Section 3 of article 1.5.5. stipulates that cooperatives that engage in transactions with non-members, shall give those non-members the option the become members, which – in a way – creates an open door policy and a mandate to associate potential members which – apart from a very specific type of worker cooperative – is not mandated by cooperative law in the Netherlands in any way. More generally, one might question whether the obligation to open membership to non-members as a condition to allow cooperative transactions with non-members is an infringement of the freedom of association of the existing members: incorporators set the ground rules in the articles of association, including that the cooperatives restricts the number of members or restricts the admission to certain criteria which then – of course – have to be applied in a non-discriminatory way.

Also, article 1.5.5. lays down another principle that contrasts with Netherlands cooperative law: the profits from non-member cooperative transactions are to be allocated to the indivisible reserves. In this respect, I would like to point out that in case of mutual cooperatives – producer cooperatives notably – the members are very reluctant to accumulate net-earnings in the indivisible reserves if there is no technique by which the accrued value of the cooperative – on exit or in case of transfer of their business or after conversion of their financial interest in the unallocated reserves into tradable allocated reserves - can be captured.[31] The rationale for allocating the profits from non-members transactions to the indivisible reserves in case of general interest cooperatives and cooperatives based on solidarity and mutuality is quite obvious, but why this should also be a mandatory obligation for the traditional, mutual cooperative eludes me.

4.2 Cooperative Governance (Chapter 2)

The second chapter of the PECOL gives in six sections an extensive legal framework of cooperative governance. Given the restrictions of this article, I will only be able to point out the most important aspects that contrast with Netherlands cooperative law. However, overall the similarities between the PECOL and Netherlands cooperative law in how cooperatives organise their internal governance, are abundant since both legal frameworks reflect that cooperatives – in the words of the sociologist Dunn[32] – are user-owned, user-controlled and for user-benefit.

Article 2.1.2. stipulates that cooperative governance reflects the jointly-owned, democratically controlled and autonomous nature of cooperatives. It facilitates operation based on 'universally recognised cooperative values and principles, including cooperative social responsibility'. Keywords are autonomy and ultimate democratic member control. According to the commentary to this principle, reference is made to the 1995 ICA Principles. The fact that many national laws require a cooperative to comply with the ICA Statement or a similar norm as a condition of registration under the cooperative law reinforces this requirement, according to the Study Group.[33] The argument is debatable since there are EU member states without this mandate in equal numbers. As indicated above, Netherlands cooperative law

[31] See for techniques of equity raising by members solving the so-called horizon problem C. Iliopoulos, 'Ownership, Governance and Related Trade-Offs in Agricultural Cooperatives', *Dovenschmidt Quarterly* 2014-4, p. 159 with further references.

[32] J.R. Dunn, 'Basic Cooperative Principles and Their Relationship to Selected Practices', 3 *Journal of Agricultural Corporation*, 1988, p. 83-89.

[33] Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 48, referring to France, Italy, Portugal, Spain and the United Kingdom.

and the existing version of the NCR[34] Governance Code for Cooperatives does not in any way mandate cooperatives to adhere to the ICA Principles.[35] If incorporators choose a cooperative based on societal objectives, than some guidance in this respect is helpful, but if incorporators use the cooperative as a jointly owned business unit with an economic objective, the incorporators should be free in organizing their articles of association – of course within the boundaries and restrictions of existing law (cooperative law or any other law).[36]

Section 2.3 of the PECOL provides an extensive overview of the rights and obligations of the members of the cooperative. With regard to the obligations of the co-operator members, the principles are formulated as mandates. In my view, it would be better to formulate the principles with regard to the obligations of the co-operator members as default rules, e.g. 'the cooperative shall ensure that the articles of association regulate that …'. For example, in the Netherlands, according to mandatory law[37] imposing obligations on members need to have a specific legal basis in the articles of association of the cooperative itself and the obligations must be knowable and identifiable from the wording in the articles of association, in order to protect members against unforeseeable financial obligations. Any omission in this respect makes the obligation null and void. Hence, the PECOL on the obligations of members need implementation in the articles of association of a Netherlands cooperative. Reference to the PECOL or a code in the articles of association is insufficient to bind the members to the obligations. Another aspect is that restrictions or a certain combination of restrictions on membership entrance and withdrawal may be an infringement of national or EU competition rules. I leave this aspect without comment.

As indicated above, another question is whether the law or any principle should oblige members to actively interact with the cooperative (article 2.3.1 sub c). This depends on the type of cooperative and should be left to the incorporators to decide while designing the type of patronage and the obligations that go with it in the articles of association.

Article 2.3.2 provides in the possibility to introduce investor members in the cooperative. In practice, some cooperatives do have a genuine demand to be able to introduce investor members as a tool to raise equity capital. The principle laid down in article 2.3.2 stipulates that investor members shall not participate in the governance of the cooperative at all. This principle is contradictory to the existing possibility envisaged in the SCE-Regulation as well as in Netherlands cooperative law.[38] More importantly, any investor will need a certain degree of leverage to safeguard his acquired right to profit on

[34] The National Cooperative Council (in Dutch: de Nationale Coöperatieve Raad) is an association with cooperatives as members to foster the interests of cooperatives in the Netherlands, e.g. through advise, education, information to members and to consult the legislator.

[35] While writing this text, there are no plans to amend the NCC in this way. However, the third version of the NCR Governance Code for Cooperatives which is expected in fall 2019, draws heavily on the 1995 ICA Principles because there is an increasing awareness of and demand for new types of cooperatives, notably small community-based social economy cooperatives, which lack normative guidance from the current cooperative law statute in the Netherlands.

[36] In this respect, it is a further question to what extend cooperatives are allowed to take into account societal aspects without leaving the cooperative form and becoming an association. See on this matter, H.-H. Münckner, 'Germany', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 272 and further. See also G.J.H. van der Sangen, *o.c.*, footnote 4, p. 547, concluding that according Netherlands' cooperative law the objective of the cooperative must be predominantly economic.

[37] Article 34a, Second Book, NCC.

[38] Article 59, Section 2, SCE-Statute and article 38, section 3, Second Book, NCC – both containing clear voting caps to safeguard to full member control.

capital invested. The voting cap in article 59, section 2, SCE-Statute and in article 38, section 3, Second Book, NCC safeguard full member control.

In article 2.3.4 sub f and g, the members have the right to engage in cooperative transactions and to receive any cooperative refund. In my view, this should be left to the incorporators and the bylaws whether members are entitled to a refund, because in practice a lot of cooperatives settle the transactions with their members on market prices without paying any refund to members after closing of the book year, while profits are allocated to the reserves. This is the case with cooperatives banks in the Netherlands and probably elsewhere, but is also becoming increasingly common practice in producer cooperatives. The economic benefit of membership in this type of cooperative lies in the fact that members do have the right to transact with the cooperative while the cooperative is obliged to transact with the member.

In section 2.4, the PECOL provide specific principles and rules on the cooperative governance structure safeguarding direct member control. I fully agree with article 2.4.5 that the members' meeting must have to power to make fundamental decisions, like restructuring (conversion, merger, split-up), dissolving and amending the articles of association as well as the appointment and dismissal of board members. In Netherlands' cooperative law, however, the decision to set-up subsidiaries falls within the scope of the authority of the board. In my view, the PECOL should also address that the articles of association articulate what type of fundamental decisions need prior approval of the members' meeting that go beyond the decisions indicated above. The PECOL in this respect are helpful to understand Netherlands' cooperative law, because the subject matter of fundamental decisions is not addressed properly in Netherlands' cooperative law, leading to potential conflicts between the members and the board about the scope of board supremacy to run the cooperative and its enterprise in the best interest of its members.[39]

With regard to the principles laid down in article 2.4.7-11 on the regulation of plural voting rights, I think the chosen direction of the PECOL is more than adequate. The only issue I have relates to the principle that plural voting rights may not be related to capital contributions. However, in practice we encounter cooperatives that have created the possibility for members to invest in the equity of the cooperative, voluntarily or mandatory, related to the volume of their patronages. In these cases, one could say that the voting rights are still not related to the capital contribution as such, but in essence to the volume of their patronage. Article 2.4.12 stipulates that a special majority is required for all fundamental decisions, which are always made on the basis of the principle of 'one member, one vote'. This should be set as a default rule for mutual cooperatives. Of course, the principle intends to protect minority members against majority oppression, but the principle may have a perverse impact if a small number of active minority members dominate the members meeting and is able to block necessary changes to innovate that are in the interest of all members and the future continuity of the cooperative itself.

Article 2.5.6 stipulates that in mutual cooperatives the majority of members of the administrative and supervisory boards shall be co-operator members. I have doubts whether this principle in all cases is in the interests of all cooperative members. Of course, the members of the supervisory board and the administrative board should be elected by the general meeting as the default rule. However, from the 2012

[39] See for example Court of Appeal Amsterdam, Enterprise Chamber, 27 February 2014, *JOR* 2014/160 (*Coöperatie TICA*) and Court of Appeal Amsterdam, Enterprise Chamber, 8 December 2015, *JOR* 2015/156 (*Coöperatie TICA*) dealing with the question whether the board of directors of the cooperative had the authority to sell the shares of its single subsidiary that settled the patronage between the members and the cooperative. The court held that the transaction resulted in a de facto dissolution of the cooperative and therefore needed prior approval of the members meeting.

EU-commissioned Report *Support for Farmers' Cooperatives* follows that members in mutual cooperatives encountered a lack of professionalism, expertise and dedicated time in case of co-operator member directors or supervisors: depending on the complexity of the operations and the business of the cooperative, there is a genuine demand in practice that boards of the cooperative are – to a certain extend – composed by professionals.[40] The other solution in practice is that the boards of the cooperative are composed of co-operator members, but the actual cooperative business is run through a fully owned subholding company – commonly a private company limited by shares – with a CEO in charge. This model has been increasingly used by agricultural cooperatives.[41] The cooperative governance and proper functioning of the administrative board and the supervisory board would likely improve if the PECOL also addressed principles of independence and (resolving) conflicts of interest, along with the fiduciary duty in article 2.5.8.

4.3 Cooperative Financial Structures (Chapter 3)

One of the most elementary principles of cooperatives is that they are for the benefit of members. User-benefit is also connected with member control and self-financing. I already commented on the principle that a cooperative carries on an economic activity *without profit* as the ultimate purpose, meaning that if a cooperative generates net proceeds or profit, the profit is not distributed to members as a compensation of capital invested. However, any set of principles or law should provide cooperatives enough leeway – which goes hand in hand with the freedom of association – to intertwine the financing of the cooperative and the way the economic activity (patronage) is constructed. Self-financing is the norm, but alternative financial schemes for attracting additional equity from cooperator members and non-using investor members should be possible as well if the incorporators and – after the establishment of the cooperative – the existing members choose to introduce this in the articles of association. Chapter Three on the cooperative financial structure in my view reflect these premises. Also, the set of principles on financial structures in the PECOL give adequate and very useful guidance how to construct the financial arrangement within a cooperative. For example, Netherlands' cooperative law has no specific regime for the financial structure of cooperatives other than the outdated regime of members' liability towards creditors in case of dissolution of the cooperative. Netherlands cooperative law lacks the necessary instruments to design adequate self-financing structures.[42] Below, I would like to make a couple additional remarks.

Cooperative share capital is and should be variable, like article 3.2.3 stipulates, due to an increase or decrease of the number of memberships. This also includes the increase or decrease the volume of patronage while the number of members remains equal. Article 3.3.5 regulates the payment on paid-up capital by way of an 'interest' to members.[43] A fixed interest seems the sensible way to proceed, but some

[40] G.J.H. van der Sangen, *o.c.*, footnote 7.

[41] See J. Bijman, M. Hanisch & G. van der Sangen, 'Shifting Control? The Changes of Internal Governance in Agricultural Cooperatives in the EU', *Annals of Public and Cooperative Economics*, December 2014, Vol 85, No. 4.

[42] See on this issue extensively G.J.H. van der Sangen, *o.c.*, footnote 27, p. 500-505.

[43] In practice, it is not always very clear whether paid-up capital classifies for accounting purposes as equity or as debt. It depends highly on the question whether according to the law or the articles of association there is an unrestricted obligation of the cooperative to refund the paid-up capital to members after a fixed period of time or on withdrawal. The

cooperatives with investing members will offer a return for their investment at a market rate related to the profit of the cooperative. As pointed out above, the principle does not seem to take into account cooperatives that settle patronage transactions on the basis of market prices.

Article 3.3.6 stipulates that cooperative shares may be traded among members or candidates, however not freely but after permission. Investor shares also need permission to be traded. In my view, both restrictions unnecessarily hamper the creation of innovative financial arrangements for financing cooperatives partially with equity: it restricts members in the possibility to transfer cooperative shares of to convert them into freely tradable financial participations that might interest institutional investors to investing in a cooperative. From the PECOL and the commentary to the principles on financial structures, it was not self-evident what the rationale was of this restriction if at the same time there are no voting rights attached to investor members' financial participation in the cooperative. For the Rabobank Group in the Netherlands – the largest cooperative bank –, it would mean that their financial structure is not in compliance with this principle, since part of their non-voting equity participations are traded on the stock market (10%).[44] The second restriction, that investors need prior approval, blocks the free tradability of 'cooperative' securities on the stock market. Here, also the Rabobank case is a good example, but there are more cases to be found in Germany and elsewhere of cooperatives of which financial participation are traded on a stock market.[45] This issue may also be important for equity-rising by general interest cooperatives through crowd funding (not as a gift, but as an investment).

In the section 3.4 about the reserves, a mandatory reserve is created for cooperative education, training and information. The need to create a reserve for education and training in some cases is understandable. This was pointed out in the research of Konrad Hagendorn, who concluded that certain underdeveloped regions and their cooperatives could benefit from education and capacity building.[46] Also this may be acceptable under the state aid rules that exempt certain financial inducements and measurements to the development of rural regions. The question may arise why a mandatory indivisible reserve should be imposed on all cooperatives including mutual cooperatives.

Section 3.5 stipulates that no member shall be liable for the debts for more than the subscribed capital, unless the statutes provide for liability of the members by guarantee, albeit with a cap. It is unclear, however, whether this entails an individual liability of members towards individual creditors during the existence of the cooperative or not. If it entails a direct liability towards creditors, this should be at least a default rule. However, this may deter potential members from becoming a member and it may also trigger members to leave the cooperative. The latter option to withdraw in case of imposing obligations on members is mandatory in the Netherlands.[47] Why not stipulate that members during the course of the cooperative are not liable towards creditors. They may be held liable towards the

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accounting rules in the IFRS on these 'puttable' shares in a cooperative are rather inconclusive. See IAS 32 and IFRIC Interpretation 2. Members' Shares in Co-operative Entities and Similar Instruments.

[44] See https://www.rabobank.com/nl/investors/index.html. This also applies to the farmers' supplies cooperative ForFarmers. See http://www.fromfarmers.eu/. It should be pointed out that according to Netherlands' cooperative law, a cooperative has no share capital structure, while voting rights are only attributed to members, save for the specific provision in article 38, section 3, Second Book, NCC that allows voting rights for non-using members, albeit with a voting cap to safeguard full member control. However, in the case of the Rabobank, no voting rights were attached to the financial participations of investors.

[45] E.g., in Germany Südzucker, in Ireland Glanbia and Kerry, in Finland Atria and HKScan, while Friesland Campina and Arla use stock traded bonds. See also for an overview O.F. van Bekkum, *Cooperative Champions or Investor Targets? The Challenges of Internationalization & External Capital*, Study commissioned by Landburg & Fødervarer, December 2009.

[46] K. Hagendorn (2014), 'Post-Socialist Farmers' Cooperatives in Central and Eastern Europe, *Annals of Public and Cooperative Economics*, December 2014, p. 555.

[47] See article 36, section 3, Second Book, NCC.

cooperative, upon liquidation for the deficit or during its existence, again with the possibility of a maximum cap.

Section 3.6 gives one example how the net proceeds of a cooperative could be distributed. As an example of a guideline it could work, but the specific financial arrangements should be left to the articles of association in view of the way how a cooperative is financed and the patronage relationship is settled. As indicated earlier, mutual cooperatives may not use the refund-technique, but pay market prices to their members. Another point should be made in this respect. Although self-financing within cooperatives is the norm, it is the responsibility of the board of directors under supervision of the supervisory board to provide a proper level of financing of the cooperative. Undercapitalisation of the cooperative leading to insolvency normally leads to directors' liability. The PECOL should address this fiduciary duty but also its restrictions in member control, since other stakeholders are involved as well, like employees and creditors.

Section 3.7 stipulates that results from non-cooperative transactions should be allocated to the indivisible reserves. Does this mean that they are not distributable to members as part of their payment for the patronage? Reserving these results to the indivisible reserves may lead to double taxation in some member states[48] and in any case effect the amount available to members and their income position.

Section 3.8 is dedicated to principles on to liquidation. Article 3.8.2. stipulates that residual net assets shall be distributed in accordance with principle of disinterested distribution. A similar principle is envisaged in article 75, SCE Statute. Article 75, SCE Statute, acknowledges that in certain member states the cooperative laws may have an alternative arrangement. Netherlands cooperative law – viewing the cooperative as a private member organisation and its members as the residual claimants – allocates the residual net assets to the members. On the basis of article 23a, section 1, Second Book, NCC, members are entitled to equal distribution of the net proceeds, unless the articles of association provide otherwise. Articles 3.8.2 with regard to the disinterested distribution should be considered to be formulated as a default rule by which the freedom of association is upheld.

For example, suppose in a certain region twenty growers of prunes establish a cooperative that collects their prunes and manufactures and markets a beverage. The members invested in the cooperative and in the quality of the prunes and product and in the branding of the quality. The cooperative has registered the brand with the competent authorities. After thirty years, the sons of the sons of the initial founders have moved to town. The only solution – because there is no other cooperative in the area – is to sell-off the trademark to a non-cooperative competitor, pay all creditors and liquidate the cooperative. The residual profit will be distributed to members in proportion to their investment which through the years was connected to the volume of their patronage. Why should it not be possible that these growers stipulate in the articles of association that the residual net assets will be distributed proportionally to members at the time of dissolution?

[48] This is the case in the Netherlands: any reservation of the net proceeds leads to double taxation under the Corporate Income Tax 1969 rules that also apply to cooperatives. See G.J.H. van der Sangen, 'Netherlands', in: D. Cracogna et.al. (eds.), *International Handbook of Cooperative Law*, Springer-Verlag, Berlin 2013, p. 557.

4.4 Cooperative Audit (chapter 4)

Chapter 4 is dedicated to cooperative audit and draws heavily on the extensive rules and regulations in this respect in German cooperative law.[49] I have no additional comments to this section which is not to say that the subject matter is not important for cooperatives. On the contrary. In my view – based on the results of the 2012 *Support for Farmers' Cooperatives Project* – expert auditing and subsequent transparency and information towards members how the success and performance of the cooperatives is measured related to the patronage and non-cooperative activities, is pivotal. According to the 2012 *Support for Farmers' Cooperatives Report*, in several EU member states the accountability due to a lack of financial experts (auditors) and expert supervision of a supervisory board was troublesome, resulting in lacunae in accountability.[50] Further research should be done into the question whether specific 'cooperative' auditors will lead to better informed members. For example, auditing the annual accounts of cooperatives in the Netherlands is left to market parties and there are no auditor firms that specifically focus on only cooperatives. Also, there are no specific set of rules on accounting for cooperatives distinct from investor-owned firms. Yet, there is no indication that members of cooperatives in the Netherlands are not informed properly about the performance of cooperatives. One reason is that members of a cooperative have the right to file for an inquiry procedure at the Court of Appeal, Enterprise Chamber,[51] in case of non-compliance with accounting rules and could also file for a restatement of the annual financial accounts in case the annual financial accounts are drawn-up incorrectly.[52]

4.5 Cooperation among cooperatives (chapter 5)

In the Chapter on cooperation among cooperatives, the Study Group drew-up principles to give legal guidance to one of the 1995 ICA Principles. As such, the principles intend to create scale and power vis-à-vis investor-owned firms. Of course, EU member states may promote the cooperation between cooperatives by giving financial inducements to them within framework and rules for EU state aid. However, my main concern is with respect to the PECOL on cooperation among cooperatives is that any mandate to cooperate between cooperatives is bound to be in conflict with the principle of autonomy and the freedom of association. In this respect, it should be pointed out that the ICA Principles via its incorporation into the ILO Recommendation No. 193 are only binding for the members of the ILO and do not give any mandate to cooperatives unless stipulated otherwise by national law, which is the case in Portugal.[53]

Also, whether a cooperative should seek in all circumstances cooperation with other cooperatives is a business decision and if it results in a major transaction which changes the structure and governance of the cooperative fundamentally, the general assemble should give prior approval. In the respect, the PECOL strive for scale through the formation of secondary or federated cooperatives. The formation of

[49] See H. Munckner, 'Germany', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 319-330.

[50] G.J.H. van der Sangen, *o.c.*, footnote 7, p. 22.

[51] Article 346, section 1, sub a, Second Book, NCC.

[52] Article 447, Second Book, NCC.

[53] See article 3 Portuguese Civil Code. On this subject: D. Meira, 'Portugal', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 415.

federated cooperatives or second tier cooperatives should be formed based on a business case. Sometimes a merger is better. Based on the 2012 *Support for Farmers' Cooperatives Project*, data suggest that federated cooperatives did not perform better than primary cooperatives, quite the opposite.[54]

5. Concluding remarks

Drafting Principles of European Cooperative Law has been an ambitious project. In this article, the objectives of the PECOL, their role in the legal framework of EU Cooperative Law and their content were discussed and commented. The PECOL fill in a gap between generally accepted, universal cooperative principles and cooperative law. From the evolution of the SCE Statute and the research on its implementation by the research group of Euricse and its partners,[55] one can conclude that cooperative laws in the EU are highly path-dependent. In this respect, the PECOL provide a more detailed set of principles that could be used by legislators, co-operators, policy-makers and scholars to discuss what the essentials are of the cooperative as a legal business form. The next step, in my view would be to draft model acts as an inspiration how to set-up cooperatives. In this respect, further research is needed into the question whether two set of principles and model acts are required. One for the mutual cooperative and one for the general interest cooperative. In some jurisdictions the general interest cooperative as envisaged in the PECOL might be viewed more as an association than as a cooperative. Also, the question arises whether the PECOL reflect the nature of mutual cooperatives with a pure economic objective. While commenting on the PECOL, I highlighted some remarkable differences with regard to Netherlands' cooperative law and submitted that Netherlands cooperative law could benefit from the PECOL especially in the field of financial structure and auditing of cooperatives. Also, the PECOL could be used to reform Netherlands cooperative law to facilitate cooperatives in the field of social economy.[56]

Apart from a point of reference for future cooperative law-making, the importance of PECOL lays in my view in the following intertwined aspects. First of all, legislators do not always have an adequate understanding of the quintessential characteristics of the cooperative. For example, in the Netherlands, the focus of the legislator is on investor-owned firms and financial market regulation without addressing the specific nature of the cooperative in rules that apply to all private companies. It leads to the companisation of cooperatives.[57] Secondly, the SCE Statute gave a boost to the cooperative and intensified academic debate on cooperative law. However, the SCE Statute itself was construed on the foundations of the Societas Europeae, which in turn was based on the public company. Thirdly, the PECOL not only provide guidelines to take into account while revising future business organizational cooperative law, but also creates awareness of the identity of the cooperative in other fields of law as well, like tax law and competition law. Fourthly, the PECOL provide a legal framework for those member states, like the Netherlands, that are unfamiliar with the role of mutual cooperatives with a societal dimension and which role these cooperatives can play in the social economy. At this point, Netherlands

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[54] J. Bijman et.al., *Support for Farmers' Cooperatives*, Final Report, November 2012, p. 11, available at http://ec.europa.eu/agriculture/external-studies/index_en.htm.

[55] Euricse et.al., *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society*, 5 October 2010.

[56] On 17 May 2019, the Dutch Government announced a feasibility study for a business form specifically designed for 'social enterprises'.

[57] See above, footnote 19.

cooperative law is missing this normative aspect, while at the same time the societal demand for such a legal framework is growing.[58] Fifthly, the PECOL already function as the starting point of the emergence of cooperative law as an autonomous field of law distinct form company law. In this respect, the PECOL could reinstate the societal, inclusive and normative aspect that Netherlands cooperative law once had. As the promotor of the cooperative movement in the Netherlands J.H. Boudewijnse pointed out 120 years ago: 'A genuine cooperative is cooperative that in its endeavours adheres to the same principles once put into practice so brilliantly by the Pioneers of Rochdale. A false cooperative concern the type of association that, formally established as a cooperative and acknowledged as such by law, only strives for self-centred objectives.[59]

[58] See G.J.H. van der Sangen, 'De rol van principles in het coöperatierecht' ('The Role of Principles in Cooperative Law'), *TvOB* 2019-2, p. 36-43.

[59] J.H. Boudewijnse, *Welke zijn de beginselen die aan de toepassing der Coöperatieve denkbeelden ten grondslag behooren gelegd te worden*, Drukkerij Trio, The Hague 1899, p. 15.