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## **COOPERATIVE IDENTITY AND THE LAW**

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# COOPERATIVE IDENTITY AND THE LAW\*

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## Abstract

This paper deals with the legal identity of cooperatives. It is divided into three parts. The first part discusses the role and function of law and of comparative legal research on the topic of cooperative identity (sec. 2). The second part focuses on cooperative identity within the International Cooperative Alliance (ICA) Principles and the ICA Statement on the Cooperative Identity at large (sec. 3). The third part compares the ICA Statement on cooperative identity with the legal identity that several European jurisdictions assign to cooperatives (sec. 4). Conclusions follow.

## Keywords

Cooperatives; Cooperative law; Cooperative identity; Comparative cooperative law; European cooperative law; Cooperative principles

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## 1. Introduction

This paper deals with the legal identity of cooperatives. It is divided into three parts. The first part discusses the role and function of law and of comparative legal research on the topic of cooperative identity (sec. 2). The second part focuses on cooperative identity within the International Cooperative Alliance (ICA) Principles and the ICA Statement on the Cooperative Identity at large (sec. 3). The third part compares the ICA Statement on cooperative identity with the legal identity that several European jurisdictions assign to cooperatives (sec. 4). Conclusions follow.

## 2. Cooperative identity and the law

Beginning with the importance of law for cooperative identity, this section of the paper seeks to illustrate the aspects implied in, and the problems related to, a comparative legal analysis of this particular subject.

There is no doubt that, in general, law plays a substantial role in the development of cooperatives, their defence against potential detractors, and their good standing in competition with other legal forms that may be employed to conduct business, particularly companies<sup>1</sup>. This is true for a number of reasons, which are not now listed<sup>2</sup>. It may suffice to mention here the recent European Union Court of Justice's judgement of 8 September 2011, where EU law – namely, Council Regulation (EC) 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE Regulation) – is essential for the Court to draw the distinction between cooperatives and other economic operators, which may justify (and therefore assess compatible with the common market) tax exemptions granted to cooperatives under national legislation<sup>3</sup>.

Notwithstanding the above, the legal dimension of cooperatives has not been sufficiently explored by scholars, especially at the international level and from a comparative perspective<sup>4</sup>. In light of its importance, the hope is that the cooperative movement will take responsibility for promoting and supporting research in this field.

This research should start from the specific topic of the legal identity of cooperatives, which naturally takes precedence over all other topics – not only for the sake of a systematic legal analysis, but also from a political point of view, as the

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<sup>1</sup> See, recently, HENRY H., *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendation 193*, paper presented at the United Nations Expert Group Meeting “Cooperatives in Social Development: Beyond 2012”, Ulaanbaatar (3-6 May 2011); see also CRACOGNA D., *Legal, Judicial and Administrative Provisions for Successful Cooperative Development*, paper presented at the Expert Group Meeting on “Supporting Environment for Cooperatives: A Stakeholder Dialogue on Definitions, Prerequisites and Process of Creation” organised by the United Nations and the Government of Mongolia, Ulaanbaatar (15-17 May 2002), currently available at [http://www.un.org/esa/socdev/social/papers/coop\\_cracogna.pdf](http://www.un.org/esa/socdev/social/papers/coop_cracogna.pdf).

<sup>2</sup> But see, FICI A., *European Cooperative Law*, forthcoming.

<sup>3</sup> See European Union Court of Justice, 8 September 2011 (C-78/08 to C-80-08) and particularly point 55 ff. in <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109241&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=607787>. This decision is more carefully examined in FICI A., *European Cooperative Law*.

<sup>4</sup> Important, although not recent, exceptions in English include MÜNKNER H.H., *New Trends in Co-operative Law of English-Speaking Countries of Africa*, Marburg, 1971; MÜNKNER H.H. & ULLRICH G. (eds.), *Co-operative Law in East, Central and Southern African Countries. A Comparative Approach*, Berlin, 1980; MÜNKNER H.H. & ULLRICH G. (eds.), *Co-operative Law in Southeast Asia. A Comparative Approach*, Berlin, 1981. For an interesting overview, but in Italian, see VERRUCOLI P., *Società cooperative. IV) Diritto comparato e straniero*, in *Enciclopedia Giuridica Treccani*, XXIX, Roma, 1993. See also HENRY H., *Guidelines for Cooperative Legislation*, 2<sup>nd</sup> edition, Geneva, 2005.

aforementioned EUCJ decision suggests<sup>5</sup>. Surprisingly, however, the topic of the legal identity of cooperatives has not yet received the attention it deserves, even despite frequent warnings by eminent analysts about the “hybridization”, “companization” or “degeneration” of the cooperative model<sup>6</sup>, which is a trend that may alter the natural and undoubted capacity of cooperatives to contribute to a better world<sup>7</sup>, or at least to sustainable economic development<sup>8</sup>.

Certainly, the identity issue is at the core of the ICA’s mission<sup>9</sup>. Moreover, one should not forget that those provisions, commonly referred to as “ICA Principles”, are in fact, embodied in the “Statement on the co-operative identity”<sup>10</sup>.

It seems, however, that the global debate on cooperative identity still has not taken the legal aspects of said identity into sufficient consideration.

Indeed, law could serve as a powerful lever for the defence and promotion of cooperative identity, as it may give cooperatives a precise, unquestionable and easy-to-convey identity. This is particularly useful in the global context and before potential institutional opponents and/or promoters, such as states, courts, etc.<sup>11</sup>. Furthermore, it is more arduous to defend an identity that does not correspond to an identity defined by law. It is worth recalling again the use of the SCE Regulation by the EU

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<sup>5</sup> As correctly pointed out by HENŘY, *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendation 193*, assigning a distinct legal identity to cooperatives is a precondition to calling for their equal treatment relative to (for-profit) companies, for example in the field of taxation. Indeed, the distinct identity may justify a specific and diverse treatment of cooperatives as compared to companies, while treating cooperatives the same as companies would cause disparity given the uniqueness of cooperatives. The principle of equality requires that similar situations be treated in a similar way, while different situations must be treated in different ways. Fortunately, the EUCJ judgement of 8 September 2011 seems to share this line of reasoning.

<sup>6</sup> See, respectively, SPEAR R., *Co-operative Hybrids*, paper presented at the Conference of Research Committee of the ICA with the CRESS Rhone-Alpes and the University Lyon 2 “Co-operatives’ contributions to a plural economy” (2-4 September 2010), currently available at [http://www.cress-rhone-alpes.org/cress/IMG/pdf/Spear\\_pap.pdf](http://www.cress-rhone-alpes.org/cress/IMG/pdf/Spear_pap.pdf); HENŘY, *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendation 193*; SOMERVILLE P., *Co-operative Identity*, in 40.1 *Journal of Co-operative Studies*, 2007, p. 10. The Norwegian debate preceding the current law on cooperatives is also important in this regard: see FJØRTOFT T. & GJEMS-ØNSTAD O., *Cooperative Law in Norway – Time for Codification?*, in 45 *Scandinavian Studies in Law*, 2003, p. 119 ff. (see, in particular, p. 123-124, where the codification of cooperative law is seen as a necessary means to maintain the distinctiveness of cooperatives, thus preventing isomorphism).

<sup>7</sup> “Cooperative enterprises build a better world” is, as known, the slogan of 193/2012 UN International Year of Cooperatives, whose purpose is to highlight the contribution of cooperatives to socio-economic development, recognizing, in particular, their impact on poverty reduction, employment generation and social integration (see <http://www.2012.coop/>).

<sup>8</sup> See, in particular, HENŘY, *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendation 193*, which argues: “The alignment of cooperative law on stock company law not only infringes upon the cooperative identity which has to be preserved under public international law, it also weakens the potential of cooperatives to contribute to sustainable development”.

<sup>9</sup> On the ICA’s website one may read: “ICA’s priorities and activities centre on promoting and defending the co-operative identity, ensuring that co-operative enterprise is a recognised form of enterprise that is able to compete in the marketplace” (see <http://www.ica.coop/ica/index.html>). Moreover, the ICA’s statutes include in the “Mission statement” the following: “[The ICA] is the custodian of co-operative values and principles and makes the case for their distinctive values-based economic business model which also provides individuals and communities with an instrument of self-help and influence over their development” (see <http://www.ica.coop/ica/2009-ica-statutes.pdf>).

<sup>10</sup> For the reader’s convenience (also given that it will represent one of the main points of the paper), the Statement is included (as found at <http://www.ica.coop/ica/2009-ica-statutes.pdf>) as an annex to this paper.

<sup>11</sup> While a different problem may here arise, namely, that the legal identity does not correspond or ceases to correspond to the identity delineated by the cooperative movement.

Court of Justice to recognize the cooperative's distinct identity relative to other business organisations.

In light of this, one cannot but highly appreciate the attempts by a well known cooperative legal scholar to demonstrate the legal nature of ICA Principles. Said legal nature would derive from the fact that these principles are incorporated in ILO Recommendation 193/2002, which – as this scholar maintains through several arguments – should be considered a source of public international law<sup>12</sup>.

However, even if this theory is accepted, notwithstanding the importance of this result for the cooperative movement, the problem of the cooperative legal identity would remain unsolved and, thus, the need for comprehensive legal studies would remain unchanged. This is due to the fact that ICA Principles are too general and do not provide indications as to several crucial aspects of the cooperative identity<sup>13</sup>. Moreover, they are not followed by many current cooperative laws in Europe, which recognize as cooperatives organisations that do not correspond, even roughly, to the cooperative model provided by ICA Principles. More generally, there are several national cooperative rules whose compliance with ICA Principles is highly debatable.

The immediately preceding arguments represent the core of this paper and define its objective. The paper will underline those elements of the cooperative identity that clearly emerge from ICA Principles, as well as those elements that are not considered therein or that remain somewhat obscure.

This type of analysis is necessary to verify whether or not national cooperative laws respect ICA Principles, to ascertain the degree to which they depart from them, to understand how national legislators implement ICA Principles and substitute for the regulatory gaps in ICA Principles.

This paper mainly aims to suggest a line and a method for future research, by briefly showing how the legal comparison might work and what elements such comparison might comprise. Certainly, this paper does not purport to offer a complete picture of the proposed subject, which would be an extremely complex and time-consuming task for a number of reasons.

Firstly, because in the real world the cooperative is a diverse and multi-faceted phenomenon. Its variety is due either to the nature of the relationship between the cooperative and its members (consumer-, worker-, producer cooperatives), or to the type of business involved (agricultural cooperatives, cooperative banks, etc.), and sometimes also to the specific aim pursued (e.g., social cooperatives). It also depends on the nature and characteristics of the membership (primary, secondary, tertiary cooperatives; small and large cooperatives; homogeneous and not homogeneous cooperative membership in terms of quantity/quality/nature of the individual contribution to the cooperative activity). The variety is greater than that which one

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<sup>12</sup> See HENRY, *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendation 193*. This Recommendation may be found at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R193>.

<sup>13</sup> This is consistent with the idea that ICA Principles are only “general guidelines” for legislators, as correctly pointed out by CRACOGNA, *Legal, Judicial and Administrative Provisions for Successful Cooperative Development*, p. 4, and not legal provisions in the strict sense. If one wants to sustain their nature as legally binding provisions, s/he would need to devote a focused effort to provide them with a specific content.

may observe in the company form, which for this reason is an easier model to understand, study and regulate<sup>14</sup>.

However – although cooperative laws would adequately regulate their subject matter only to the extent that they take all its various aspects into account, consequently requiring future cooperative legal studies to deal increasingly with “cooperatives” instead of “cooperative” – there are general basic aspects which, as stated, still need to be addressed and fully developed by cooperative legal scholars. This scholarly research is a precondition for the further development of cooperative studies, and it is the research to which this paper is aimed.

Secondly, if one examines the national legislation on cooperatives, even within the same legal family or tradition (*e.g.*, civil law), s/he would find not only one, but many diverse cooperative legal identities, as this paper will attempt to show.

The analysis is, moreover, complicated by the fact that the access itself to the national sources of cooperative law is not simple for a foreign observer or a comparative lawyer. In Europe alone there are at least six formally different models of cooperative legislation (ranging from a cooperative code, as in Portugal, to the absence of a cooperative law, as in Ireland)<sup>15</sup>, and this scheme would appear yet more complex if one also considers the duality general laws/special laws on particular types of cooperatives (France is an example evident in this respect), the residual (*i.e.*, gap-filling) application of company law rules to cooperatives, the alternative default/mandatory rules in the regulation of cooperatives and the degree of regulatory power awarded to cooperative statutes, *etc.*<sup>16</sup>.

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<sup>14</sup> From a regulatory point of view, the structure of the property is the main element to take into consideration while differentiating the legal treatment of companies (namely, listed companies and non-listed companies, where “listed” should be used in a broader sense in order to include also those companies with a large and dispersed crowd of shareholders: see recently on the importance of this distinction for company regulation the *Report of the Reflection Group on the Future of EU Company Law*, Brussels, 5 April 2011, in [http://ec.europa.eu/internal\\_market/company/docs/modern/reflectiongroup\\_report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf)), as there is a sole type of relationship between the company and its members (investment of capital, even if for different member motivations) and the nature of members and the output are irrelevant in this respect.

<sup>15</sup> In this regard, it is possible to present and classify at least six models of cooperative legislation as follows:

- 1) Absence of cooperative law (Ireland)
- 2) Cooperative regulation in a formally independent act (*e.g.*, Austria, Germany)
- 3) Cooperative regulation in the commercial code (*e.g.*, Czech Republic, Slovakia)
- 4) Cooperative regulation in a company act (*e.g.*, Luxembourg) or in the company code (*e.g.*, Belgium) or in the natural persons and company act (*e.g.*, Liechtenstein)
- 5) Cooperative regulation in the civil code (*e.g.*, Italy, the Netherlands)
- 6) Cooperative regulation in a cooperative code (Portugal).

Of course, this is only a formal distinction, which looks at the location of cooperative regulation. It may certainly happen that rules governing cooperatives are substantially identical notwithstanding their location. Points 2) and 6), in fact, differ only in the more emphatic use of the term “code” to name the act on cooperatives. For further details and comments see FICI, *European Cooperative Law*.

<sup>16</sup> On all these aspects see the *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, Executive summary and part I, October 2010. This Study is the result of a year-long project run by a Consortium made up of Cooperatives Europe, EKAI foundation and EURICSE (the latter as the Consortium leader), with the scientific direction of the author of this paper, in execution of a service contract with the EC. The Study was delivered in October 2010 and contains both a study on the implementation of the SCE Regulation and a study on the national cooperative laws of the 30 European countries involved, as well as a synthesis and comparative study, which highlights on the one hand the weaknesses of the SCE Regulation and the need for its amendment, and on the other hand the great variety of cooperative law in Europe. The Study may be found at [http://ec.europa.eu/enterprise/policies/sme/files/sce\\_final\\_study\\_part\\_i.pdf](http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_i.pdf).



This current state of the legislation (which may also be found if one compares national and supranational legislation, *i.e.*, the SCE Regulation and national cooperative laws of the countries to which this Regulation applies)<sup>17</sup> further complicates both legal studies on cooperative identity and the promotion of cooperative identity by global and regional cooperative representative organisations. Comparing for research purposes and conveying a precise, unique identity for political reasons become more complex when national legislation is so varied.

Nevertheless, it seems that any theoretical suggestion regarding unification or even approximation of cooperative laws is received coldly by the relevant cooperative stakeholders, even when one underlines that this process should be bottom-up (that is, driven by the cooperative movement itself and not imposed from the top). Perhaps this is only the result of the current governance structure of the global cooperative movement, which appears to be nation-centred. By way of contrast, it would be more difficult to justify and support diversity in terms, and on the basis, of the opportunity to protect cultural and historical diversity among countries, if one holds that national law diversity may be a concrete obstacle to the development of cooperatives<sup>18</sup>. The issue of a uniform cooperative legal identity should be further pondered by, and within, the cooperative movement<sup>19</sup>.

Last but not least, a comparative legal study on cooperative identity requires consensus both on the elements to take into account to define such identity and – moving from a pure descriptive to a normative analysis – on the “ideal” identity, that is to say, the identity to assume as *tertium comparationis*. This paper will take ICA Principles, duly interpreted, as the starting point for its analysis, although it recognises that this is a conventional way to proceed and many other ways would be possible and legitimate as well<sup>20</sup>.

For these reasons, this paper aims to point out a issue and to present a possible method of analysis through which to view and to resolve this issue. Research on the field of cooperative legal identity from an international and comparative perspective would require additional resources of time, space and knowledge, and a team of scholars from different countries and legal traditions<sup>21</sup>.

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[http://ec.europa.eu/enterprise/policies/sme/files/sce\\_final\\_study\\_part\\_ii\\_national\\_reports.pdf](http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_ii_national_reports.pdf), and <http://www.euricse.eu/it/node/256>. See also FICI, *European Cooperative Law*.

<sup>17</sup> Without mentioning here the particular situation created by the presence within a single state of different levels of cooperative legislation, state and regional, as is the case in Spain.

<sup>18</sup> An additional doubt arises: is variety in national cooperative laws really the effect of cultural and historical legacies or is it, in fact, a consequence of the global cooperative movement’s failure to provide a clear and uniform cooperative identity?

<sup>19</sup> This does not necessarily imply achieving uniformity in the overall cooperative regulation, but only in the legal definition of the cooperative identity. This is another reason why legal studies on cooperative identity are important and should be encouraged.

<sup>20</sup> An identity can be qualified as distinct only insofar as other identities are known and well-defined. Therefore, an additional condition for a reliable and careful study on cooperative identity is knowledge of the law applicable to the other legal forms of (business) organisation, especially companies, given that identity is a relational concept and cooperatives need to be distinguished, particularly from companies.

<sup>21</sup> In this regard, it is worth mentioning that Euricse has recently launched a project named “Study Group on European Cooperative Law” (SGECOL), with the aim to establish a permanent group of scholars specialised in cooperative law. Currently, SGECOL is comprised of the author of this paper as coordinator; Gemma Fajardo, University of Valencia; Hagen Henry, University of Helsinki; David Hiez, University of Luxembourg; Hans H. Münkner, University of Marburg; Ian Snaith, University of Leicester. The kick-off meeting took place in Trento on 29-30 November 2011. More information on this Group and its projects may be found at <http://euricse.eu/en/node/1960>.

### 3. Cooperative identity in ICA Principles

The relevance of ICA Principles (and in general of the ICA Statement on cooperative identity) for the legal analysis of cooperative identity is based on their nature of “persuasive” source of cooperative law. The strongest and most concrete evidence of this effectiveness is shown by their mention, or even their formal incorporation, in some national cooperative laws<sup>22</sup>.

Moreover, there is no doubt that the relevance of ICA Principles would considerably increase for one who shares the aforementioned theory, according to which ICA Principles are principles of public international law (having been incorporated in ILO Recommendation 193/2002).

ICA Principles convey a type of business organisation characterised both by the aims pursued and by the governance structure. Consequently, this paper will re-arrange their various statements according to the two items “aims” and “governance structure”, which are the two elements sufficient and necessary in the legal analysis to identify a specific type of organisation and distinguish it from others<sup>23</sup>.

This paper will adopt a broad concept of “aims”, which includes not only the final purpose of the cooperative, but also the activity performed in order to pursue it (in legal terms sometimes referred to as the “social object”)<sup>24</sup>. In defining the aims, this paper considers the provisions on the destination of surplus to be equally relevant.

By way of contrast, the analysis does not include those statements that do not affect cooperative legal identity, such as the voluntary nature of the act of cooperative establishment (see “definition” and 1<sup>st</sup> principle), and the nature of its members, whether individuals or cooperatives or other types of organisations (although this last element may be important for cooperative regulation in general)<sup>25</sup>.

Most statements of ICA Principles need to be interpreted and/or to be completed by way of interpretation. In some cases it is only a matter of literal interpretation, while in other cases functional and/or global interpretations are necessary. Nevertheless, many regulatory gaps remain, which may be interpreted either as permitting what is not expressly prohibited or as prohibiting what is not expressly permitted.

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<sup>22</sup> See the examples of Cypriot Cooperative Act 22/1985 (sec. 6), Maltese Cooperative Societies Act XXX/2001 (art. 21, par. 2), Portuguese Cooperative Code 51/1996 (art. 3), Romanian Cooperative Act 1/2005 (art. 7, par. 3), Spanish Cooperative Act 27/1999 (art. 1, par. 1).

<sup>23</sup> On the limits of a pure functional approach, and the necessity to involve the element of the internal organisation or structure in the definition of, and for the distinction between, the various business organisations and company types, see MARASÀ G., *Le società*, 2<sup>nd</sup> edition, in Iudica & Zatti (eds.), in *Trattato di diritto privato*, Milano, 2000, p. 39 ff.

<sup>24</sup> See for example art. 2521, par. 3, n. 3, Italian civil code (where it regulates cooperatives).

<sup>25</sup> From a strictly legal point of view, it is obvious that cooperatives, as a type of private organisation, are set-up voluntarily by their members. ICA Principles, by putting emphasis on the free process of formation of cooperatives, intend to stress their private, and thus not public nature, in consideration of the uncertain nature of cooperatives in some countries and times (*e.g.*, in past-Soviet countries).



### 3.1. Cooperative aims

#### 3.1.1. A cooperative is an organisation that runs an enterprise

In the “definition” embodied in the Statement, “a jointly-owned and democratically controlled enterprise” represents the way the cooperative (and its members) pursues its aims.

Therefore, according to ICA Principles, the cooperative is a particular type of organisation whose activity consists of running an enterprise. Consequently, those organisations whose “social object” is different (e.g., to award grants, to provide free services, etc.) might not be considered cooperatives.

#### 3.1.2. A cooperative enterprise provides services to its members

The provision of services by a cooperative enterprise to its members emerges literally from the 1<sup>st</sup> and the 3<sup>rd</sup> principles.

This is one of the most significant elements of cooperative identity (especially in order to distinguish cooperatives from companies), as well as one of the most controversial. It seems that, according to ICA Principles, the cooperative enterprise is directed toward members, aiming to provide services to them. In other words, the members of a cooperative – who are or become such by providing and subscribing to its capital (see 3<sup>rd</sup> ICA principle) – are also users of the services provided by their cooperative, which they obtain through transactions with the cooperative.

Therefore, in cooperatives, the members/owners are also the users/customers: they possess this “double quality”<sup>26</sup>.

ICA Principles do not clarify whether the identification user-member has to be complete or may also be partial, which raises two fundamental questions:

- a. whether or not members other than users (*i.e.*, non-user members) are admissible<sup>27</sup>; and
- b. whether or not users other than members are possible (namely, whether or not the cooperative may provide services to non-members)<sup>28</sup>.

There is not an explicit solution to either question in ICA Principles.

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<sup>26</sup> Sometimes, this concept is also expressed by the formula “identity principle” to point out that in a cooperative owners and users are identical: see MÜNKNER H.H., *Ten Lectures on Co-operative Law*, 1982, p. 52; ID., *Principios cooperativos y derecho cooperativo*, 1988, p. 32 ff.; MÜNKNER H.H. & VERNAZ C., *Annotated Co-operative Glossary*, Marburg, 2005, p. 140, according to whom: “Some scientists of co-operative theory see this principle as the most important characteristic feature distinguishing co-operatives from other forms of organisation. It means that as a matter of principle the supporters (shareholders and decision-makers) and the users of the services of the co-operative enterprise (in case of service co-operatives: members’ businesses or households; in case of workers’ cooperative societies: the workers), are the same persons, *i.e.* are identical”. This should also explain the qualification of cooperatives as “self-help organisations” (see ICA Statement under “values”), given that they are set-up by members to satisfy their common needs. However, this formula seems too generic as all organisations, including companies, are set-up to satisfy member needs (in case of companies, to invest their capital), although, of course, the nature of member needs in companies and in cooperatives is different, which, among other things (members’ joint control, democracy, “external” allocation of part of surplus, etc.), contributes to determining the “social function” of cooperatives as compared to companies (on this point see below in the text).

<sup>27</sup> Non-user members would inevitably be members who only confer capital and do not transact with the cooperative, as such, not distinguishable from the shareholders of a company, even though the ultimate reasons for providing capital to the cooperative may be varied (on this point see below in the text).

<sup>28</sup> In the case of an affirmative response, one should further inquire about the conditions and the limits of the permitted activity with non-members (on this point see below in the text).

Although ICA Principles refer to the provision of services by the cooperative to its members, this does not exclude the possibility of other types of transactions taking place between the cooperative and its members, such as the provision by the cooperative of goods, and the provision by members of work (in worker cooperatives) or of goods and services (in producer cooperatives)<sup>29</sup>. “Provision of services” should be, therefore, broadly and not literally interpreted.

### 3.1.3. A cooperative is an organisation acting in the interest of its members, aiming to satisfy their common economic, social and cultural needs

The above heading stems from the “definition” embodied in the ICA Statement on the cooperative identity.

Hence, in strictly legal terms, the cooperative might not be considered an “altruistic” organisation or, more precisely, a “social enterprise”, since it does not act exclusively or primarily in the general interest or in the interest of the community, but in the interest of its members (*i.e.*, it typically aims to benefit members and not others). In this regard, there is no difference between cooperatives and companies<sup>30</sup>.

This does not mean, however, ignoring the particular social function of cooperatives (as compared to companies)<sup>31</sup>, which is the result of the aim pursued – to satisfy needs other than the remuneration of capital; of their particular governance structure – where persons count more than capital and all count equally given the principle of democracy (see sections 3.2.1. and 3.2.3.); and of the various obligations of “external” surplus destination included in ICA Principles (see sec. 3.1.4.)<sup>32</sup>.

This is perhaps the reason why the cooperative form has been used by national legislators for the introduction of the social enterprise in their national legal systems. The first generation laws on social enterprises in Europe, beginning in Italy in 1991, were laws on social cooperatives: a special type of cooperative characterised by the aim to pursue the general interest<sup>33</sup>.

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<sup>29</sup> In general, the tripartition consumer-, worker-, producer- cooperatives helps to understand better the cooperative world as well as to regulate it adequately.

<sup>30</sup> Significantly, KRAAKMAN R., ARMOUR J. *et al.*, *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 2<sup>nd</sup> edition, Oxford, 2009, p. 15, maintains that “business corporations are effectively a special kind of producer cooperative, in which control and profits are tied to supply of a particular type of input, namely capital”; in other words – in the authors’ view – they are “capital cooperatives” for which the law provides a special statutory form. It must be noted that this contention has existed for more than 100 years, being firstly expressed (to the author’s knowledge) by an Italian economist, according to whom it is impossible to distinguish cooperatives from other business organisations (see PANTALEONI M., *Esame critico dei principi teorici della cooperazione*, in *Giornale degli economisti*, 1898, p. 202 ff.). Of course, in the text, a very strict concept of “social enterprise” is adopted, in line with the Italian legal tradition. Social enterprises – as Italian laws 381/91 on social cooperatives and 155/06 on social enterprises demonstrate – are only those organisations acting in the general interest and not in the interest of members (the interest of members may be pursued only as long as members themselves pertain to the category of the beneficiaries of the social enterprise, by acting in whose interest the social enterprise pursues the general interest).

<sup>31</sup> The social function of cooperatives is, for example, explicitly recognized in art. 45 of the Italian Constitution.

<sup>32</sup> On this point see FICI A., *Cooperatives and Social Enterprises: Comparative and Legal Profile*, in ROELANTS B. (ed.), *Cooperatives and Social Enterprises. Governance and Normative Frameworks*, Brussels, 2009, p. 77 ff.

<sup>33</sup> The picture has partially changed with the introduction in Europe of general laws on “social enterprises”, where this qualification does not depend on the use of the cooperative form, so that social enterprises in various forms (association, foundation, cooperative and even company) may be established: see FICI, *Cooperatives and Social Enterprises: Comparative and Legal Profile*.

Indeed, a conceptual distinction between social cooperatives and cooperatives needs to be drawn. Social cooperatives do not have the same aim as other cooperatives (or those cooperatives to which ICA Principles refer), because, as for example Italian Law 381/91 on social cooperatives states, they “act in the general interest of the community” and not in the main interest of their members as provided for in the definition of a cooperative in the ICA Statement on the cooperative identity<sup>34</sup>.

On the other hand, cooperatives have a social function that contributes to distinguishing them from companies and, as said, to approximating them to social enterprises.

3.1.4. A cooperative may only partially remunerate members for the capital subscribed (partial profit distribution constraint) and is obligated to allocate its surplus for certain purposes, including external/altruistic ones, such as the benefit of the cooperative movement and of the community

The 3<sup>rd</sup> ICA principle clearly states that a cooperative may not have a total for-profit aim, namely, the aim to remunerate the members for the capital subscribed (which, by way of contrast, is the typical aim of companies). Only a limited compensation of the capital subscribed is permitted in cooperatives. This is another one of the most important elements of the cooperative identity, which contributes significantly to its distinction from that of companies (which normally do not face any distribution constraints).

ICA Principles do not specify what compensation on the capital is permitted, that is to say, they do not define the limits of profit distribution.

In addition, ICA Principles mention certain purposes for which the cooperative surplus should be allocated by members (*rectius*, by the cooperative), namely:

- developing the cooperative, possibly by setting-up reserves, at least part of which should be indivisible (3<sup>rd</sup> principle);
- benefiting members in proportion to their transactions with the cooperative (3<sup>rd</sup> principle);
- supporting other activities approved by the membership (3<sup>rd</sup> principle);
- education and training of members, managers, *etc.*, and information of the general public (5<sup>th</sup> principle);
- strengthening the cooperative movement (6<sup>th</sup> principle);
- implementing policies for the sustainable development of the community (7<sup>th</sup> principle).

In this regard, ICA Principles are somewhat vague.

Certainly, they do not put sufficient emphasis on the distribution of surplus in proportion to member transactions with the cooperative, which should be the cooperative distinctive way of rewarding members, given their “double quality”. Indeed, while company members (*i.e.*, shareholders) are remunerated because of, and in proportion to, the capital subscribed, cooperative members should be remunerated because of, and in proportion to, their transactions with the cooperative.

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<sup>34</sup> On the legal aspects of Italian social cooperatives, see, in English, LOLLI R., *Social Cooperatives in the Context of Recent Italian Regulations*, in HIEZ D. (ed.), *Droit comparé des coopératives Européennes*, Brussels, 2009, p. 73 ff. Earlier, but in Italian, see FICI A., *Cooperative sociali e riforma del diritto societario*, in *Rivista di diritto privato*, 2004, n. 1, p. 75 ff.

At the very least, this specific type of cooperative member remuneration should have a name (e.g., "patronage refunds") in a source as important as ICA Principles<sup>35</sup>.

ICA Principles should be clearer in establishing that the cooperative is obligated to set-up indivisible reserves as a guarantee of financial stability (especially taking into account capital variability as provided for by numerous cooperative laws, also as a result of member exit from the cooperative) and of inter-generational solidarity among cooperative members.

Also the regime of indivisible reserves would need to be better clarified, with particular regard to the question of whether their distribution is possible in case of member exit from the cooperative or of cooperative dissolution. In general, the legal status of a non-profit organisation should embrace the requirement that accumulated reserves be not distributed also in case of member exit or of dissolution of the organisation, because otherwise a sort of *ex post* profit distribution to members would take place. But in cooperatives the situation is more complex, since on the one hand cooperatives may partially remunerate paid-up capital and on the other hand they may remunerate members in proportion to the volume of the transactions with the cooperative.

Finally, while it should be clearly stated that the external/altruistic allocations of surplus according to the 5<sup>th</sup> (with regard to the information of the general public), 6<sup>th</sup> and 7<sup>th</sup> principles are compulsory, the extent to which they are so is not defined in any way<sup>36</sup>.

## 3.2. Governance structure

### 3.2.1. A cooperative is a democratic organisation

The democratic character of the cooperative mentioned in the "definition" and "values" statements is developed in the 2<sup>nd</sup> ICA principle, according to which "in primary co-operatives members have equal voting rights ("one member, one vote") and co-operatives at other levels are also organised in a democratic manner".

This gets to the core of the cooperative identity<sup>37</sup> and of the distinction between cooperatives and companies, considering that in the latter the default principle of organisation is "one share, one vote"<sup>38</sup>. In cooperatives, each member has a vote regardless of the amount of the subscribed capital, which means that members are all treated equally notwithstanding the different extent of their individual financial participation in the cooperative. This is the reason why in some legal environments cooperatives are considered associations of persons, and why cooperative members are not to be considered shareholders although, in fact, they contribute to the capital of their cooperative (see 3<sup>rd</sup> ICA principle); and additionally, it is the reason for the

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<sup>35</sup> This remuneration assumes in the cooperative legislation and theory various names: patronage refunds (see, for example, art. 93, par. 2, Maltese Cooperative Societies Act XXX/2001), cooperative returns, cooperative refunds, etc. Unfortunately, in other pieces of legislation they are called "dividends", which is something that does not help distinguish it from the compensation on capital [see art. 66 of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE Regulation)].

<sup>36</sup> As already pointed out, external/altruistic allocations of the cooperative surplus are another element of the social function of cooperatives.

<sup>37</sup> As well, to the core of the intrinsic social function of the cooperative is: the school of democracy, the school of entrepreneurship, the instrument of economic democracy or market democratization.

<sup>38</sup> See, for example, with regard to public limited-liability companies, art. 2351, par. 1, Italian Civil Code.

primacy of individuals in cooperatives<sup>39</sup>, and why cooperative capital and shares do not have the same (organisational and economic) function as in companies.

ICA Principles do not contain any explicit exception to the “one member, one vote” method in primary cooperatives, so that one may ask whether or not, in light of the 2<sup>nd</sup> ICA principle, national cooperative laws may provide for exceptions, and in the case of an affirmative response, to what extent and under what conditions.

The 2<sup>nd</sup> ICA principle is more general only with regard to secondary, tertiary or higher-level cooperatives, for which it requires a democratic manner of organisation, but not necessarily the “one member, one vote” method. Strictly speaking, cooperatives at other levels should only be considered those consisting of primary cooperatives, which reduces the scope of potential legal exceptions to the “one member, one vote” rule. It is not perfectly clear what might constitute a democratic manner of organisation when “one member, one vote” does not apply<sup>40</sup>.

### 3.2.2. A cooperative is an organisation controlled by its members (external control is not permitted)

In a certain sense, the 4<sup>th</sup> ICA principle completes the democratic principle of administration (see sec. 3.2.1.), thereby strengthening its effects. The 4<sup>th</sup> ICA principle makes it clear both that a single member cannot control the cooperative (which is already the consequence of the “one member, one vote” method), and that all members as a whole should be free to govern the cooperative without external influences deriving, for example, from contractual agreements to obtain finance<sup>41</sup>.

In the case of cooperative laws permitting non-user investor members in a cooperative – which is frequent in European national legislation – the 4<sup>th</sup> principle should also play a role in order to prevent the cooperative from being controlled by this category of members.

It would perhaps read too much into the text the interpretation according to which this principle rules out the possibility of admitting non-members in the administrative organ of the cooperative or, at least, requires that the majority of members of the administrative organ be cooperative members. In fact, if non-member administrators are elected and may be removed by cooperative members, cooperative members maintain (albeit indirectly) the control of the cooperative and the 4<sup>th</sup> ICA principle would be respected in this regard<sup>42</sup>.

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<sup>39</sup> See recital 8 in the preamble of the SCE Regulation, cited in point 56 of EUCJ judgement of 8 September 2011.

<sup>40</sup> A possible democratic method in this instance might be considered that each cooperative, comprising the secondary or the higher-level cooperative, has a number of votes proportioned to the number of its members.

<sup>41</sup> This point would need further analysis with specific attention to the subject matter of cooperative groups formed of cooperatives controlled by a single cooperative. On this point see art. 2545-*septies*, Italian Civil Code, dealing with the “joint cooperative group”.

<sup>42</sup> It has to be noted, however, that some European jurisdictions require that only members be part of the management or administrative organ of a cooperative: see for references *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part I. A different solution lies in Italian law where at least the majority of administrators must be user-members (art. 2542, par. 2, Civil Code), and in the SCE Regulation with regard to the supervisory organ in the two-tier system (art. 39, par. 3, SCE Regulation) and to the administrative organ in the one-tier system (art. 42, par. 2, SCE Regulation).

### 3.2.3. A cooperative is an “open” organisation

The open membership in cooperatives is set forth by the 1<sup>st</sup> ICA principle, according to which “Co-operatives are [...] open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination”.

However, this statement may be interpreted in two different ways:

- a. either in the sense that a cooperative is obligated to admit as members those who, being able to use its services, ask for admission (“open door” principle); or
- b. in the more limited sense that if and when the cooperative decides to admit new members, the cooperative cannot select them on a discriminatory basis.

In the first case, there would be an obligation to admit new members. In the second case, there would only be an obligation not to discriminate against applicants.

If the first interpretation prevails, the problem arises both for establishing substantive requirements and for establishing limits on this obligation; that is to say, if and when the cooperative refusal is legitimate, how to effectuate control of cooperative decisions with respect to admission requests and to protect third parties who wish to become members of a cooperative.

In addition, in light of the “open door” principle, it would be very difficult to justify a cooperative that permanently operates with non-members but, nevertheless, refuses requests for admission (especially when these requests come from the very non-members with whom the cooperative operates). The difficulty would be the same where a cooperative actually applies to non-member users the same conditions that it applies to its user-members, given that the former would not, in any case, hold the governance rights that the latter possess as members of the cooperative.

The open character of the cooperative, therefore, does not only imply capital variability, which is solely the technical legal instrument that facilitates new member admission in a type of organisation which, by its very nature, is “open”<sup>43</sup>.

A final remark is necessary upon the conceptual difference between an “open” organisation, such as a cooperative according to a decidedly, strict interpretation of the 1<sup>st</sup> ICA principle, and an organisation whose shares may freely circulate, as is the principle in companies<sup>44</sup>.

An “open” organisation is an organisation that wishes or that is obligated by law to share the utility it produces with third-party subjects by making them members. This is a manifestation of the “solidarity” of the organisation and of its “social function”, which derives from the fact that those who are members at any particular moment in time are not the exclusive beneficiaries of the organisation. Existing members in an “open” organisation accept the potential reduction of their utility by the admittance of

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<sup>43</sup> See, for example, art. 1, par. 2, and art. 3, par. 5, SCE Regulation: the second provision sets forth that “Variations in the amount of the capital shall not require amendment of the statutes or disclosure”, which is the legal essence of capital variability.

<sup>44</sup> While in cooperatives the opposite principle, that share transfers must be authorized by administrators, exists: see, for example, art. 2530, par. 1, Italian Civil Code. However, in cooperative laws, this regulatory aspect should be examined in connection with that of member resignation, since a liberal member resignation regime (which, in effect, may be found in some cooperative laws) may compensate for the prescriptive share transfer regime.



new members with whom they will have to share the overall utility<sup>45</sup>. These considerations might not be extended to an organisation whose shares are freely transferable, since the circulation of the shares only determines a modification of the owner, but not of the total number of owners (and therefore of the beneficiaries of the organisation). Hence, companies are organisations whose shares are normally transferable, but not “open” in the aforementioned sense, as is also shown by the regime of the modification of capital by the issuance of new shares, which normally protects current shareholders by allowing them to buy the new shares, thus preserving the existing equilibrium within the company<sup>46</sup>.

### 3.3. ICA Principles on cooperative identity summarily (and in comparison with the legal identity of companies)

The table below summarizes the results of the preceding analysis of the cooperative identity in ICA Principles and compares it with the ordinary legal identity of companies: differences emerge clearly.

**Table 1 - ICA Principles on cooperative identity summarily (and in comparison with the legal identity of companies)**

	<b>ICA Cooperative Identity</b>	<b>Company Identity</b>
Nature of the activity performed	Enterprise	Enterprise
Nature of users	Members	No restrictions
Principal aim	To act in the interest of its user-members, also by remunerating them in proportion to the quantity/quality of their transactions with the cooperative	To act in the interest of its shareholders by remunerating them in proportion to the capital subscribed
Additional aims	To support new cooperative members (also by setting-up indivisible reserves), the cooperative movement and the community	No additional aims
Principle of governance	“One member, one vote”	“One share, one vote”
Control	Members’ joint control	A single shareholder may control the company (and companies with only one shareholder are also possible)
“Open” organisation	External control not permitted	External control possible
	Yes	No

## 4. Cooperative identity and cooperative laws

This section of the paper will address those that appear to be the main questions in terms of cooperative identity raised by the cooperative laws of several European jurisdictions, particularly if one decides to adopt the ICA cooperative identity as the ideal-type for comparative reasons. This part of the paper will also show the great variety in defining a cooperative that may be found in European national legislation, together with the great variety in the implementation of each ICA principle.

<sup>45</sup> Of course, third parties will assume after admittance also risks and losses, but the fact that they voluntarily apply for admission makes clear what the text intends to emphasize.

<sup>46</sup> For example, in order to protect existing members, art. 2441, par. 1, Italian Civil Code, awards them the pre-emption right to subscribe the new shares in proportion to the amount of the shares owned, which may be excluded only when the interest of the company so requires (see art. 2441, par. 5).

#### 4.1. Absence of cooperative law (and of a cooperative legal identity)

First of all, one should ask whether the absence of a national cooperative regulation, and consequently of a cooperative legal identity, is compatible with ILO Recommendation 193/2002, particularly if this is taken as a source of public international law.

In fact, point 6 of said Recommendation states: "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"; and point 10 (1) adds: "Member States should adopt specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles set out in Paragraph 3, and revise such legislation and regulations when appropriate".

While improving cooperative law for cooperative promotion is an issue that may be addressed in all European countries, there is a country in Europe without any specific cooperative regulation, which is Ireland.

It is currently being debated in Ireland whether or not a specific cooperative law is necessary<sup>47</sup>. If one considers ILO Recommendation 193/2002 as a source of public international law, it seems evident that this debate must not only evaluate the practical importance for cooperatives to possess or to not possess a legal identity – by also making an adequate comparison, in terms of positive outcomes for the cooperative movement, between countries with a "low-prescription" approach, such as Denmark, and those countries with a "high-prescription" approach, such as Norway<sup>48</sup> – but also take into account the binding force of ILO Recommendation 193/2002 and ICA Principles included therein (even leaving aside the issue of uniformity in national cooperative legal identity as a factor of cooperative growth)<sup>49</sup>.

#### 4.2. Weak cooperative identity laws (and the "double track" model of cooperative regulation)

Some cooperative laws regulate cooperatives in a way that a cooperative identity is almost inexistent or, at least, not compliant with ICA Principles identity. It is difficult, in these cases, to place a distinct identity on cooperatives relative to companies<sup>50</sup>.

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<sup>47</sup> See DE BARBIERI E.W., *Fostering Co-operative Growth through Law Reform in Ireland: Three Recommendations from Legislation in the United States, Norway and Brussels*, in 42.1 *Journal of Co-operative Studies*, 2009, p. 37 ff., arguing that "Ireland does need a law that protects the co-operative identity and gives the public a clear way to identify a co-operative society from another type of corporate entity" (p. 39); CAREY E., *Co-operative Identity – Do You Need a Law About It?*, *ibidem*, p. 49 ff.

<sup>48</sup> See in this sense CAREY, *Co-operative Identity – Do You Need a Law About It?*, p. 50.

<sup>49</sup> The Irish debate would benefit from the discussion which took place in Norway, before and in view of, the codification of cooperative law: see FJØRTOFT & GJEMS-ONSTAD, *Cooperative Law in Norway – Time for Codification?*.

<sup>50</sup> Since it refers to law in the strict sense (as a set of binding rules formally passed by authorities able to impose them coercively), this conclusion remains valid also if one considers the possibility that cooperative statutes embody all the elements of the ICA cooperative identity, which certainly may happen and could even be the norm in some countries where cooperative regulation is absent or weak. It has to be noted that, in these countries, the voluntary submission of cooperatives to cooperative principles and values is one of the arguments that opponents of the codification of cooperative law use to deny the need for this codification.

In some cases this is the result of a cooperative regulation solely based on default rules, *i.e.*, rules that are not mandatory and that are subject to opt-out, so that they apply only if cooperative statutes do not provide otherwise.

For example, in the Luxembourg regulation of cooperatives, no prescriptions may be found regarding the activity with members, the distribution of surplus in relation to member transactions with the cooperative and the establishment of indivisible reserves. Moreover, the “one member, one vote” rule only applies in the absence of regulation by cooperative statutes (art. 117, par. 1, 4°, Law 10/8/1915 on commercial companies)<sup>51</sup>. In this country the situation is even worse if one considers the figure of the “cooperative societies organised as *sociétés anonymes* [public companies]” (art. 137-1 ff., Law 10/8/1915, as modified by Law 10/6/1999), which has been correctly defined as a “caricature” of a cooperative<sup>52</sup>.

Dutch (Civil Code, II book) and Swedish (EFL SFS 1987:667) cooperative laws represent similar examples. They fail to provide a complete cooperative identity and even those aspects that they cover (including democracy) are, in fact, only regulated by default rules, thus empowering cooperative statutes to provide differently.

A slightly different situation occurs in those jurisdictions which adopt a sort of “double track” model of cooperative regulation, as they recognize two (sub)types or (sub)categories of cooperatives, one of which is characterized by a very weak cooperative identity, while in the other some features of cooperative identity appear – which, however, does not mean *per se* that these features correspond to those characterizing the ICA cooperative identity – and they are necessary for cooperative eligibility for a specific tax treatment.

Prominent examples are represented by Belgian, Danish and Italian cooperative laws.

In Belgium the regulation of cooperatives may be found in book VII of the Company Code of 1999. The Belgian cooperative as regulated by the Company Code is substantially a company with both variable capital and number of members (art. 350, Belgian Company Code). There is no provision about the activity with members. The cooperative surplus may be distributed to members without restrictions. Patronage refunds as a way of surplus distribution are not mentioned. The “one member, one vote” rule may be derogated by cooperative statutes (art. 382, par. 1, Belgian Company Code).

By way of contrast, Belgian law (Law 20/7/1955 and Royal Decree 8/1/1962) awards a specific tax treatment to those cooperatives which pay only a limited interest, if any, on the capital subscribed by members (art. 1, par. 2, 6°, Royal Decree 8/1/1962), distribute surplus to members in proportion to their operations with the cooperative (art. 1, par. 2, 5°, Royal Decree 8/1/1962), and award no more than a certain percentage of total votes to a single member (art. 1, par. 2, 3°, Royal Decree 8/1/1962)<sup>53</sup>.

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<sup>51</sup> See HIEZ D., *Luxembourg*, in *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part II. National reports, October 2010; HIEZ D., *Les coopératives luxembourgeoises: l'exemple d'un système libéral*, in HIEZ (ed.), *Droit comparé des coopératives européennes*, p. 145 ff.

<sup>52</sup> See HIEZ, *Les coopératives luxembourgeoises: l'exemple d'un système libéral*, p. 154 ff.

<sup>53</sup> See D'HULSTÈRE D., *Belgium*, in *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part II. National reports, October 2010; COIPEL M., *Les avatars de la coopérative en droit belge*, in HIEZ (ed.), *Droit comparé des coopératives européennes*, p. 125 ff.; on Belgian

In Denmark, the law applicable to cooperatives is the Consolidate Act on Certain Commercial Undertakings, No 651 of 15/6/2006. This law provides a definition of cooperative which is more stringent than that found in the Belgian Company Code.

According to art. 4 of Danish Law 651/2006, "a co-operative (a co-operative society) means an undertaking [...] whose objects are to help promote the common interests of the members through their participation in the business activities as buyers, suppliers or in any other, similar way, and whose profit, other than normal interest on the paid-up capital, shall either be distributed among the members in proportion to their share of the turnover or remain undistributed in the undertaking". This definition evidently contains some basic elements of cooperative identity. It highlights the particular nature of the cooperative membership/ownership (members as users), the profit distribution constraint ("normal interest") and the obligation to distribute the surplus in proportion to member activity with the cooperative (*i.e.*, patronage refunds). However, there are no provisions on non-distributable reserves, external allocations of surplus (in favour of the cooperative movement or the community), democracy, or the open character of the cooperative.

Danish Law 1001/2009 recognizes as "taxable cooperatives", thus eligible for a specific tax treatment, cooperatives that promote the interest of at least 10 members; have a turnover with non-members that does not exceed 25% of the total turnover; distribute surplus to members, except for a normal interest on capital (equal to the discount rate of the Danish National Bank), in proportion to their turnover with the cooperative or reinvest it<sup>54</sup>. In effect, in the Danish example, tax law does not lay down additional requirements, but only specifies, for tax purposes, the general ones.

After the reform of 2003, Italian cooperative law (Civil Code, book V, art. 2511 ff.) presents a peculiar distinction between "mainly mutual cooperatives" and "other" or "not mainly mutual cooperatives".

While in the regulation of the first category of cooperatives all aspects of the cooperative identity are taken into account (which does not mean, however, that this regulation is *per se* to be considered conforming to ICA Principles)<sup>55</sup>, the second category is characterised by the absence of restrictions on the activity with non-members, on the distribution to members of dividends on the paid-up capital, of reserves, and of residual assets in case of dissolution.

According to what this paper has called the "double track" model, only "mainly mutual cooperatives" are awarded a specific tax treatment, which means that also in Italy tax law is crucial for cooperative identity<sup>56</sup>.

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cooperative law see also COATES A. & VAN OPSTAL W., *The Joys and Burdens of Multiple Legal Frameworks for Social Entrepreneurship – Lessons from the Belgian Case*, paper presented at the 2<sup>nd</sup> EMES International Conference on Social Enterprise, Trento (1-4 July 2009), in [www.emes.net](http://www.emes.net).

<sup>54</sup> See JAKOBSEN G., *Denmark, in Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part II. National reports, October 2010.

<sup>55</sup> For an Italian cooperative to be considered "mainly mutual" several requirements need to be met: limited activity with non-members; limited distribution of dividends on paid-up capital; allocation of the surplus according to the quantity or quality of member operations with the cooperative; compulsory and non-distributable reserve funds; disinterested distribution of assets in case of dissolution; *etc.*

<sup>56</sup> An explanation of the Italian situation may be found in FICI A., *Italian Co-operative Law Reform and Co-operative Principles*, Euricse Working Papers, No 2/2010, in [www.ssrn.com](http://www.ssrn.com).

The above examples demonstrate that, in Europe, the name of “cooperative” may be used by organisations whose nature is different from that of the cooperative defined by ICA Principles and ILO Recommendation 193/2002. The problem is that the law permits this. The main questions are whether ILO Recommendation 193/2002 is really binding, how it should be enforced, and whether this legal situation damages the cooperative movement.

By way of contrast, in other European jurisdictions, cooperative laws provide a cooperative identity closer to that of ICA Principles. In this regard, in Europe there are both “traditional” cooperative laws, strictly abiding by ICA Principles (see, among others, Bulgarian, Cypriot, Polish cooperative laws), and more innovative cooperative laws which try to combine the respect of ICA Principles with the need to adapt the regulation to particular (mainly financial) needs of the cooperative [see, among others and each to a different extent, Finnish, French, Italian (with limited regard to “mainly mutual cooperatives”), Norwegian, Slovenian cooperative laws].

However, as the following analysis will point out, the way in which ICA Principles are concretely applied, and the extent to which they are respected, vary among countries, thus giving rise to a plurality of cooperative legal identities.

#### *4.3. The cooperative enterprise: activity with members and activity with non-members*

As previously noted, according to ICA Principles, a cooperative is an organisation that aims to act with its members as users (of the services and goods provided by the cooperative), providers (of the services and goods used by the cooperative for its economic activity) or workers (worker cooperatives). This makes the cooperative different from companies, since in companies users (or providers and workers) do not necessarily coincide with shareholders (nor, if this happens, would companies be directed to maximizing their interest as users but only as shareholders). Consequently, unlike companies, cooperatives are not means to remunerate and accumulate capital, but to satisfy other specific needs.

Whether the law addresses and protects this cooperative profile must be investigated; for example, by denying or, at least, limiting the possibility for the cooperative to operate with non-members (*i.e.*, to provide to, acquire from, and employ non-members).

In treating this point, one should also consider that the cooperative may face a momentary need to enlarge the area of its purchasers, sellers and workers, so that the real problem is raised by a permanent activity conducted with non-members<sup>57</sup>.

The analysis of European national cooperative legislation results as follow.

In some cooperative laws, the definition of cooperative explicitly includes the relationship between the cooperative and its members, while the aspect of the activity with non-members is not considered, which might be interpreted as if the cooperative may not act with non-members.

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<sup>57</sup> As already pointed out in the text, ICA Principles are silent on the point of the admissibility of cooperative activity with non-members.



More exactly, there are cooperative laws that prohibit the activity with non-members in principle.

The example of French law is very interesting in this regard. Art. 3 of Law 47/1775 states: "Cooperatives may not allow non-members to benefit from their services, unless the specific laws that govern them authorize them to do so. If cooperatives avail themselves of this option, they are required to admit as members those persons who they allow to benefit from their activity or whose work they use, and who meet the conditions laid down by their statutes". This rule clearly shows the existing link between the "double quality" principle and the "open door" principle in the regulation of cooperatives, which has been already pointed out in this paper<sup>58</sup>.

In other cooperative laws the definition of cooperative explicitly includes the relationship between the cooperative and its members, but at the same time the law permits without explicit or precise restrictions the activity with non-members on the condition that cooperative statutes so provide<sup>59</sup>. This is the model also adopted by the SCE Regulation<sup>60</sup>.

Under other cooperative laws, cooperative transactions with non-members are explicitly regulated by imposing different restrictive measures (sometimes only for tax law purposes, as highlighted above). This means, however, that below that limit, or in presence of the conditions defined by law, the activity with non-members is permitted in any case. More precisely:

- some cooperative laws establish a specific limit to the activity with non-members in relation to the activity with members. This limit may change: for example, it is represented by a turnover of 25% of the total turnover in Danish law (for tax law purposes); by revenues or costs from the activity with non-members not higher than revenues or costs from the activity with members, in Italian law (again for tax law purposes only); by 50% of the total operations with members, as in Spanish state law with regard to agricultural cooperatives (art. 93, par. 4, Law 27/1999);
- other cooperative laws use general formulas, however, alluding to the fact that the activity with members should be prevalent: for example, Dutch law authorises cooperative statutes to provide for the conclusion with non-members of agreements similar to those concluded with members (art. 53, par. 3, Dutch Civil Code), but this power may not be exercised to such an extent that the agreements with members are only of a subordinate importance (art. 53, par. 4, Dutch Civil Code)<sup>61</sup>. Along similar lines, Norwegian law defines a cooperative as "a

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<sup>58</sup> In the sense that, in a cooperative acting with non-members, the refusal to admit them as members would not be legitimate (of course, if non-member users ask for it); namely, that a cooperative may permanently act with non-members only if its membership is really and effectively open.

<sup>59</sup> See, for example, chap. 1, sec. 2 of Finnish Act 1488/2001: "The purpose of a co-operative shall be to promote the economic and business interests of its members by way of the pursuit of economic activity where the members make use of the services provided by the co-operative or services that the co-operative arranges through a subsidiary or otherwise. However it may be stipulated in the rules of the co-operative that its main purpose is the common achievement of an ideological goal"; and chap. 2, sec. 6, par. 1 (2), stating that: "Stipulations on the following may be taken into the rules of a co-operative: [...] (2) that the services of the co-operative are to be offered also to non-members".

<sup>60</sup> According to art. 1, par. 3, SCE Regulation, "An SCE shall have as its principal object the satisfaction of its members' needs and/or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions"; but art. 1, par. 4, establishes: "An SCE may not extend the benefits of its activities to non-members or allow them to participate in its business, except where its statutes provide otherwise".

<sup>61</sup> See also art. 2, par. 2, Slovenian Cooperative Act of 1992.



group whose main objective is to promote the economic interest of its members by the members taking part in the societies as purchasers, suppliers or in some similar way”, thus permitting transactions with non-members if they do not prevail over those with members<sup>62</sup>;

- yet other cooperative laws allow the cooperative to ask for a ministerial authorisation (see art. 4 of Spanish State Law 27/1999 in the case of a cooperative that faces a diminution of activity with members which may undermine its economic viability).

#### 4.4. Membership: user-members and non-user (investor) members

According to ICA Principles, a cooperative has the purpose of engaging in transactions with its members, who are thus user-members. Consequently, the cooperative does not aim (unlike companies) to remunerate the capital provided by members. More precisely, the capital-based remuneration of members is allowed only up to a limited extent.

Given this, the question arises whether a cooperative may admit members who are only interested in the return on capital, but not in exchanging with the cooperative or in working with it. Putting it differently, the question is whether a cooperative may obtain risk capital also by “non-user” and, therefore, investor members.

Obviously, this is a relevant point in terms of cooperative identity, since the remuneration of member capital is the purpose of companies and the motivation of their shareholders. On the other hand, cooperatives, like companies, may face a problem of finance shortage, to which the admissibility of investor members might be a solution. How should cooperative law regulate this issue? Should the silence of ICA Principles be interpreted as a prohibition of pure investor members in a cooperative? And in any case, would the distribution constraint also apply to investor members<sup>63</sup>?

Facing these issues, European national cooperative laws act differently:

- the majority of cooperative laws do not deal with the issue of investor members, which might be interpreted as denial of their admissibility<sup>64</sup>;
- other cooperative laws simply empower cooperative statutes to provide for the admissibility of investor members<sup>65</sup>;
- yet other cooperative laws – along the same lines as the SCE Regulation, which has had a clear influence on this matter – on the one hand permit the participation of investor members in cooperatives (normally on the condition that cooperative statutes so provide), but on the other hand contain mandatory rules that prevent the cooperative from being controlled by the category of investor members<sup>66</sup>.

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<sup>62</sup> Sec. 1, par. 2, Norwegian Co-operatives Societies Act of 29 June 2007. See also Austrian cooperative law [sec. 1 and sec. 5, par. 1 (1), Cooperative Act of 1873] and German cooperative law [art. 5, par. 1 (5), Cooperative Act of 1889]. If the quoted Norwegian law provision may be interpreted in this sense, perhaps it would be possible to interpret also the SCE Regulation in the same way, by emphasizing the reference to “principal object” in its art. 1, par. 3.

<sup>63</sup> One can also add to these questions the following: may a user-member also be an investor-member? And if so, how should s/he be treated as compared to other investor members? identically or differently? In this regard, see for example art. 2514, Italian Civil Code, which limits the remuneration of financial instruments only when subscribed by user-members (*soci cooperatori*).

<sup>64</sup> Examples include, among others, Bulgarian, Cypriot, Danish, Maltese, Norwegian cooperative laws.

<sup>65</sup> Examples include, among others, Austrian, Finnish, German cooperative laws.

<sup>66</sup> The SCE Regulation, for example, states that investor members may not together have voting rights amounting to more than 25% of total voting rights (see art. 59, par. 3, Reg. 1435/2003). Another example is provided by art.

#### 4.5. Surplus allocation

As pointed out above, according to ICA Principles, the distinct identity of cooperatives is also based on particular criteria of surplus distribution among members that are consistent with their nature of organisations aiming at operating with their members as users of the services provided, thus satisfying needs different from the investment of capital. Moreover, by making reference to forms of surplus allocation other than the distribution to members – namely, to indivisible reserves, the strengthening of the cooperative movement, and the sustainable development of the community – ICA Principles shape a type of organisation whose “social function” emerges clearly. Hence, the question arises whether, how and to what extent cooperative law embodies this key element of cooperative identity. This element comprises several aspects, which may be specifically treated and combined by the law in different ways. Therefore, the analysis of this particular point will be limited here to showing where cooperative law prevalently conflicts with ICA Principles in the regulation of this cooperative profile.

A number of European national cooperative laws do not clearly recognize the concept of “patronage refunds” and therefore do not distinguish them from “dividends” (as returns on capital)<sup>67</sup>. This obviously results in the fact that cooperative laws cannot obligate a cooperative to distribute patronage refunds instead of dividends<sup>68</sup> or to limit the distribution of dividends, thus indirectly promoting the distribution of patronage refunds. Hence, in many European countries, the matter of surplus distribution, although crucial for the cooperative identity, is not covered by mandatory rules, but entirely entrusted to cooperative statutes<sup>69</sup>.

Confusion on this point and a consequent lack of adequate provisions also emerge in the SCE Regulation.

First, the SCE Regulation calls “dividends” what in reality are “patronage refunds”: in fact, art. 66, SCE Regulation, clearly entails the concept of patronage refunds when it refers to a payment provided to members “in proportion to their business with the SCE, or to the services they have performed for it”.

Second, the SCE Regulation fails to obligate the SCE to distribute patronage refunds instead of returns on capital: indeed, art. 66, SCE Regulation, states only that “statutes may provide” rather than *shall provide*<sup>70</sup>.

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2526, par. 2, Italian civil code, stating that holders of financial instruments (and investor members among them) may not have more than 1/3 of total votes in each member assembly. See also in this regard French, Hungarian and UK laws.

<sup>67</sup> For more details see *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part I.

<sup>68</sup> Or at least to distribute a higher amount of patronage refunds than dividends.

<sup>69</sup> There are of course important exceptions, although sometimes only for cooperative eligibility for a specific tax treatment. For example, the Italian “mainly mutual cooperative” may distribute dividends on the paid-up capital only up to a limited extent (see art. 2514, Italian Civil Code), but this limit does not apply to patronage refunds, which in Italian law are clearly differentiated from dividends (see art. 2545-*sexies*, Italian Civil Code). Another important example is provided by articles 14 and 15 of French Cooperative Act 47/1775. See also articles 48 and 58 of Spanish Cooperative Act 27/1999.

<sup>70</sup> Nor does the wording of art. 67, par. 1, seem *per se* sufficient to consider compulsory the distribution of patronage refunds in an SCE.

Finally, the SCE Regulation considers the provision of a return on paid-up capital and on quasi-equity a possible way to allocate the surplus without establishing any limit to this way of surplus allocation (art. 67, par. 2, SCE Regulation)<sup>71</sup>.

As for indivisible reserves, the comparative analysis reveals the existence of diverse approaches to this point<sup>72</sup>, which are:

- laws that do not obligate cooperatives to set-up reserve funds, simply leaving the matter to cooperative statutes<sup>73</sup>;
- laws that obligate cooperatives to set-up reserve funds and prohibit their distribution to members only during the existence of the cooperative (*i.e.*, they permit it solely in the case of cooperative dissolution)<sup>74</sup>;
- laws that obligate cooperatives to set-up reserve funds and prohibit their distribution to members even in the case of cooperative dissolution<sup>75</sup>; obviously, those cooperative laws, which, more broadly, explicitly adopt the principle of “disinterested distribution” of cooperative residual assets, must also be included in this last group<sup>76</sup>.

The analysis of European national cooperative law also reveals that the “external” allocation of part of the surplus in favour of the cooperative movement and the community – which is envisaged by ICA Principles, thus determining the partially altruistic nature of that ideal-type of cooperative – is generally not imposed by

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<sup>71</sup> Accordingly, art. 67, par. 3, SCE Regulation, permits (but does not oblige) cooperative statutes to prohibit any distribution.

<sup>72</sup> A related point regards how and to what extent compulsory reserve funds must be augmented through the destination of part of the annual surplus. The percentages of the annual surplus to be destined to the compulsory reserve fund vary among countries [from 5% to 50%: see *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, part I]. Moreover, a distinction must be drawn between those cooperative laws that set a limit to the accumulation of reserves (almost all laws), and those cooperative laws (such as the Italian) that do not. In the former, the role and function of reserves may be weaker, since normally the limit is determined as a percentage on the capital, and since normally there is no minimum capital and capital is variable in cooperatives.

<sup>73</sup> Examples include, among others, Austrian, German, Norwegian, UK cooperative laws.

<sup>74</sup> This may be considered the prevalent model in Europe. See, for example, Bulgarian (articles 14, 33, 34, 48, Cooperative Act 113/1999), Czech (articles 233 and 235, Commercial Code), Greek (art. 19, par. 3, Law 2810/2000 on rural cooperatives and art. 19, par. 4, Law 1667/1986 on civil cooperatives), Polish (art. 26, par. 2, Cooperative law of 1982) and Slovakian (articles 233 and 235, Commercial Code) cooperative laws.

<sup>75</sup> See Hungarian (sec. 67, par. 2 and sec. 71, par. 5, Law X/2006) and Romanian (art. 87, par. 2 CL of 2005) cooperative laws.

<sup>76</sup> See French, Italian (with limited regard to “mainly mutual cooperatives”), Maltese, Portuguese, Spanish cooperative laws. The principle of disinterested distribution implies that all residual (after payments of debts and reimbursement of paid-up capital to members) assets – and not only compulsory reserves – may not be distributed to members, but only to other cooperatives, the cooperative movement or in the general interest. Disinterested distribution is provided for, although through a non-mandatory rule, by the SCE Regulation (see art. 75). This point is important in terms of cooperative identity: in 2004 EC Communication on the promotion of cooperative societies in Europe [COM(2004) 18 of 23/2/2004], in [http://ec.europa.eu/enterprise/policies/sme/files/craft/social\\_economy/doc/coop-communication-en\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/files/craft/social_economy/doc/coop-communication-en_en.pdf), it is stated: “The Commission encourages Member States to ensure that the assets of cooperatives upon dissolution or conversion should be distributed according to the cooperative principle of ‘disinterested distribution’; that is to say either to other cooperatives, where members can participate, or to cooperative organisations pursuing similar or general interest objectives. Such assets are often built up over generations, and remain collectively owned and are ‘locked-in’ to the objectives of those cooperatives. However, it should be possible to provide for the assets of a cooperative to be distributed to its members upon dissolution, in well examined cases. Member States are encouraged to provide sufficient protection to cooperative assets by ensuring that in case of take-over bids and of the consequent conversion of a cooperative to the form of a public company limited by shares the wishes of members and the objectives of the cooperative are respected”.

legislators. There are important exceptions with regard to the compulsory destination of part of the surplus in favour of the cooperative movement<sup>77</sup>.

#### 4.6. *The democratic principle*

The “one member, one vote” ICA Principle – which is perhaps the most important and traditional element of the cooperative identity – is in general followed by almost all European national cooperative laws.

However, implementation of the “one member, one vote” varies significantly across countries, so that, again, cooperative laws may be divided into the following groups:

- there are cooperative laws where “one member, one vote” is a mandatory rule and no exceptions are provided by law<sup>78</sup>;
- there are cooperative laws where “one member, one vote” is only a default rule, and is thus subject to opt-out by cooperative statutes.

More precisely, this second group of laws may be further divided into several sub-groups given that:

- some cooperative laws do not set explicit limits to cooperative statutes, which means that derogation is free in principle<sup>79</sup>;
- other cooperative laws permit only certain derogations based on the nature of the cooperative (*e.g.*, agricultural cooperatives), of the membership (*e.g.*, secondary cooperatives, cooperatives among entrepreneurs), of the criterion applied to award more votes (*e.g.*, in proportion to member activity with the cooperative), of the beneficiary (*e.g.*, investor member), or on a combination of these elements<sup>80</sup>;
- yet other cooperative laws set specific limits on cooperative statutes’ power to derogate, in order to prevent the cooperative from being controlled by a single member (or by a single category of members)<sup>81</sup>.

#### 4.7. *The admission of new members and the “open” character of a cooperative*

By referring to the open membership of cooperatives, the 1<sup>st</sup> ICA principle makes another aspect of the sociality of cooperatives stand out: if membership is open, all

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<sup>77</sup> See the Italian example of the obligation for the cooperative to devolve to “mutual funds” 3% of annual net profits (art. 2545-*quater*, par. 2, Civil Code and art. 11, par. 4, Law 59/1992). Mutual funds are run by (organisations controlled by) cooperative federations with the objective to promote and support the development of cooperatives (see art. 11, Law 59/1992). According to Italian law, mutual funds are also the recipients of cooperative residual assets after dissolution (art. 2514, Civil Code, but with limited regard to “mainly mutual cooperatives”).

<sup>78</sup> See, for example, Bulgarian and Cypriot cooperative laws. There also are cooperative laws that consider the rule mandatory only when voting on specific matters (see sec. 240, par. 1, Czech Commercial Code).

<sup>79</sup> See, for example, Belgian (art. 382, par. 1, Company Code) and Dutch (art. 38, par. 1, Civil Code) cooperative laws.

<sup>80</sup> Examples include, among others, chap. 4, sec. 7, n. 2, Finnish Cooperative Act 1488/2001; art. L 524-4 of French Rural Code; art. 3-*bis* and art. 9, par. 2, French Cooperative Act 47-1775; art. 43, par. 3, German Cooperative Act of 1889; art. 8, par. 1, Greek Act 2810/2000 on rural cooperatives; art. 2526, par. 2, art. 2538, par. 3, art. 2543, par. 2, Italian Civil Code; art. 38, Norwegian Co-operatives Societies Act of 29 June 2007; art. 26, Spanish Cooperative Act 27/1999. It is worth observing that, where more votes are awarded to a member in proportion to his/her volume of activity with the cooperative, this is a criterion for awarding more votes that is perfectly consistent with the typical aim of a cooperative as discussed above in the text. In this regard, it is also worth mentioning that in the UK regulation of “bona fide cooperatives” it is expressly stated that voting power may not be based on capital contribution by members (see FSA notes, point 9).

<sup>81</sup> See, for example, the cooperative laws cited in the preceding footnote.

people wishing to join the cooperative may, in theory, take advantage of the benefits the cooperative is able to provide. Evidently, the concept of open membership presupposes, by its very nature, that non-members are treated differently (and not better) than members, because otherwise this cooperative feature would make no sense. As previously pointed out, however, the ICA requirement of open membership can be interpreted in two different ways, either as an obligation for a cooperative to admit new members, or only as an obligation not to discriminate against third parties who ask for admission. In any case, as already observed, the open character of the cooperative would require a technical legal instrument that facilitates new admissions, namely, capital variability, which in fact is provided for by nearly all European national cooperative laws (in many cases in the very definition of the cooperative).

How have legislators interpreted and applied the 1<sup>st</sup> ICA Principle?

The SCE Regulation seeks a sort of compromise between cooperative autonomy and the interest of third parties in a rule that may be found in several European countries<sup>82</sup>. Art. 14, par. 1, SCE Regulation, on the one hand states that the request for admission is subject to approval by administrators; and on the other hand, in the case of refusal, entitles candidates to appeal to the general meeting. Therefore, the open character of the cooperative is certainly not interpreted in a manner that obligates a cooperative to admit third parties nor so as to extend to third parties a right to be admitted. In fact, only indirect protection through the right to appeal to the general meeting (which, of course, may refuse the request) is offered to third parties' interest. The question arises whether third parties may in some way oppose an opportunistic, unjustified, refusal of admission<sup>83</sup>. In any case, it would be important that cooperative laws explicitly prohibit discrimination on the basis of those elements, such as gender and race, mentioned by the 1<sup>st</sup> ICA principle, as some cooperative laws already do<sup>84</sup>.

Other cooperative laws provide weaker rules in this regard or fully empower cooperative statutes to regulate the matter, which is questionable from the point of view of cooperative identity and the respect of ICA Principles.

## 5. Conclusions

The comparative law analysis conducted in this paper has shown that, in Europe alone, several different cooperative legal identities may be found, and that, consequently, ICA Principles are not strictly followed or are broadly interpreted by European national legislators.

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<sup>82</sup> See, among others, Bulgarian (art. 8, Cooperative Act 113/1999), Greek (articles 5 and 6, Act 2810/2000 on rural cooperatives; art. 2, Act 1667/1986 on civil cooperatives), Hungarian (sec. 43, Act X/2006), Italian (art. 2528, Civil code), Maltese (art. 52, par. 2, Law XXX/2001), Portuguese (art. 31, Cooperative Code), Spanish (art. 13, Act 27/1999) cooperative laws.

<sup>83</sup> Interesting wordings in this respect may be found in the UK regulation of "bona fide cooperatives", where it is stated on the one hand that membership "should not be restricted artificially to increase the value of the rights and interests of current members" (see FSA notes, point 9), and on the other hand that "for example, the membership of a club might be limited by the size of its premises, or the membership of a self-build housing society by the number of houses that could be built on a particular site" (*ibidem*); see also Norwegian Cooperatives Societies Act of 29 June 2007, where it is stated that refusal of admission requires "reasonable grounds" (art. 14).

<sup>84</sup> See art. 16, Polish Cooperative Act of 1982. See also art. 2527, par. 1, Italian Civil Code.

Certainly, this situation does not help differentiate cooperatives from the mainstream and dominant model of the investor-owned for-profit company, which may have a negative impact on market pluralism. Indeed, a specific legal treatment of cooperatives, for example under tax and competition laws, is harder to justify when their legal identity is unclear, widely varied across countries, and in certain cases far from the paradigmatic one proposed by ICA Principles. That, among other things, calls for the promotion of legal studies, particularly comparative ones, by the cooperative movement and its representative organisations.

In addition, and primarily, more should be done with regard to the effectiveness of ICA Principles. Their effectiveness does not only depend on their presumed quality of public international law principles, as a consequence of their formal incorporation in ILO Recommendation 193/2002, but also on their completeness and clarity, as well as on the capacity of the ICA to impose this standard, which perhaps presupposes a governance of the cooperative movement less nation-centred than it currently appears to be. Moreover, notwithstanding the fact that this paper has used ICA Principles as point of reference for the comparative law analysis of cooperative identity, one cannot exclude that other terms of comparison might appear more adequate in the future, especially if the ICA does not make sufficient efforts to detail and renovate its Principles, thus improving their effectiveness.

Cooperative law scholars should also study more the matter of uniformity and diversity in cooperative law. This is an issue that has drawn the attention of company law scholars<sup>85</sup>, but has not yet been considered by cooperative law scholars. The common idea that there is a local tradition in cooperative law, which needs to be protected in any case, might be challenged in the interest of the cooperative movement itself and of market pluralism<sup>86</sup>. Perhaps, a global market imposes a global cooperative identity, and the lack of a cooperative uniform legal identity is a concrete obstacle to the development of cooperatives and the accomplishment of effective pluralism in the marketplace.

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<sup>85</sup> Quotations are pointless as there are many company law articles focusing on this issue. However, to start, see the papers published on the European Corporate Governance Institute website ([www.ecgi.org](http://www.ecgi.org)).

<sup>86</sup> Again, it is worth underlining that uniformity in cooperative law may be limited to the central elements of the cooperative identity without including those aspects (mainly pertaining to the governance) that do not relate to this specific profile of cooperative regulation. In other words, uniformity and diversity in cooperative law may co-exist.



## Annex: ICA Statement on the Co-operative Identity

- *Definition*

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

- *Values*

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

- *Principles*

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

- *1<sup>st</sup> Principle: Voluntary and Open Membership*

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

- *2<sup>nd</sup> Principle: Democratic Member Control*

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

- *3<sup>rd</sup> Principle: Member Economic Participation*

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

- *4<sup>th</sup> Principle: Autonomy and Independence*

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

- *5<sup>th</sup> Principle: Education, Training and Information*

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

- *6<sup>th</sup> Principle: Co-operation among Co-operatives*

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

- *7<sup>th</sup> Principle: Concern for Community*

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