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WHERE DO WE STAND?**

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PAN-EUROPEAN COOPERATIVE LAW: WHERE DO WE STAND?*

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Abstract

This paper aims to provide a brief general overview of the present state of European Union (EU) cooperative law from the perspective of harmonization of cooperative law in Europe. It also presents the author's point of view on the possible future of both EU cooperative law and the harmonization of European national cooperative laws.

Keywords

Cooperatives, European and comparative cooperative law, European cooperative society, approximation of cooperative laws.

JEL classification

K29, L29, L39

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1. The “ingredients” of EU cooperative law

In dealing with EU cooperative law, it is necessary, first of all, to recall the “ingredients” (not just the “sources” in a strictly legal sense) of this area of law.

First, there are two provisions in the Treaty on the Functioning of the European Union (TFEU): article 54(2), which includes cooperative societies in those “company or firms”, whose freedom of establishment is granted by EU law¹; and art. 50(2)(g), which is very important from a systematic perspective; indeed, this article has provided the basis for harmonization directives in the field of company law; whereas, although referring to cooperatives as well, it has not been used to harmonize cooperative law, as will be pointed out later in this paper².

Second, and the most relevant for EU cooperative law, Council Regulation (EC) n. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), which constitutes the main focus of this paper³.

¹ See article 54, TFEU (*ex art.* 48 TEC): (1) “Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States”. (2) “‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making”.

Art. 49 TFEU (*ex art.* 43 TEC) states: (1) “Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State”. (2) “Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital”.

² See art. 50(2) TFEU (*ex art.* 44 TEC): “The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: ... (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union”.

³ The [SCE R](#), like the EEIG and the SE Rs, was based on art. 352 TFEU (*ex art.* 308 TEC), stating that “if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament”. Art. 352 TFEU – rather than art. 114 (*ex art.* 95 TEC) on the approximation of laws – was considered the correct basis for the adoption of this Regulation by the European Union Court of Justice in the decision of 2 May 2006 (C-436/03). In this judgment, indeed, the Court argues that the Regulation “aims to introduce a new legal form in addition to the national forms of cooperative societies” (point 40); “leaves unchanged the different national laws already in existence” (point 44); and therefore “cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms” (point 44). Moreover, according to the Court, this “finding is not affected by the fact that the contested regulation does not lay down exhaustively all of the rules applicable to European cooperative societies and that, for certain matters, it refers to the law of the Member State in the territory of which the European cooperative society has its registered office, since ... that referral is of a subsidiary nature” (point 45).

Third, Council Directive 2003/72/EC of 22 July 2003, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, which this paper will not take into consideration⁴.

Fourth and very important for an understanding of cooperatives at the EU level, the Court of Justice of the European Union judgement of 8 September 2011 on state aid, which – as this paper will conclude – may be seen as a possible means of *de facto* harmonization of national cooperative laws in Europe⁵.

Fifth, some communications from the European Commission (EC), namely, COM(2004) 18 on the promotion of cooperative societies in Europe and the more recent COM(2011) 206 on the Single Market Act and COM(2011) 682 on the Social Business Initiative⁶. Indeed, all these communications, especially COM(2004) 18, deal in part with EU law and are of some importance for understanding the treatment of cooperatives under EU law.

Finally, in a provocative manner, this paper adds to the components of EU cooperative law some official documents which in fact do not, while in theory should, deal with cooperatives; for example, cooperatives are improperly ignored by the recent proposal for a directive on a Common Consolidated Corporate Tax Base, COM(2011) 121⁷. This addition provides a real example of the consideration received by cooperatives at the EU level, and will be discussed in the last part of this paper.

2. Harmonizing cooperative law by directives?

In theory, a possible way to harmonize cooperative law is by EU directives.

Aforementioned art. 50(2)(g) TFEU – which has been largely used as a basis for harmonizing company law – might equally be the basis for cooperative law harmonization. Indeed, in this provision of the Treaty, cooperative mobility is considered to be on the same level of company mobility, and in fact, in dealing with cooperatives, making safeguards equivalent for the protection of the interests of member and others would not be a senseless measure given the great variety of cooperative laws across Europe⁸.

⁴ See now the Report from the European Commission, [COM\(2010\) 481 final](#), of 16 September 2010, on the review of this directive, which concludes as follows: “It is necessary to inquire into the reasons for the very low take-up of the EU legal framework for cooperatives, before considering any moves towards a revision of the Directive”. On this subject, see SNAITH, “Employee Involvement in the European Cooperative Society: A Range of Stakeholders?”, in *22 International Journal of Comparative Labor Law and Industrial Relations*, 213 ff. (2006); FICI, “Società cooperativa europea e partecipazione dei lavoratori” in FICI, GALLETTI (eds.), *La società cooperativa europea*, Università degli Studi di Trento, 137 ff. (2006); ALCARAZ, “La participación de los trabajadores en la sociedad cooperativa europea”, in ALFONSO SÁNCHEZ (eds.), *La sociedad cooperativa europea domiciliada en España*, Thomson, Aranzadi, 489 ff. (2008).

⁵ See Court of Justice of the European Union, 8 September 2011 ([C-78/08 to C-80/08](#)).

⁶ See respectively [COM\(2004\) 18 final](#), of 23 February 2004; [COM\(2011\) 206 final](#), of 13 April 2011; and [COM\(2011\) 682 final](#), of 25 October 2011.

⁷ See Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), [COM\(2011\) 121 final](#), of 16 March 2011.

⁸ It must be noted that, if art. 50 (2) (g) TFEU were applied to cooperatives, it would assume a broader and partially different meaning relative to its application to companies. In cooperatives relevant interests to be safeguarded would not only be those of creditors, but also those of people interested in becoming members, in

In practice, however, this path has not been followed thus far⁹, and seems hardly foreseeable or generally advisable. This conclusion stems from both the observation of the latest developments in the harmonization of company law and the characteristics of the cooperatives laws to be harmonized.

The process of harmonization of company law in Europe has witnessed distinct phases.

After a difficult start in the sixties, where only one directive was issued¹⁰, the two following decades were marked by strong legislative activism, which led to the adoption of the major number of the existing harmonization directives¹¹.

Thereafter the process stalled. The main roadblocks were the proposed fifth directive on corporate governance¹², the ninth directive on groups of companies, and the fourteenth directive on the cross-border transfer of the registered office¹³. The nineties were years of amendments to the existing directives and reflection on the purposes and scope of the harmonization process.

light of the cooperative principle of the “open door”. Similarly, cooperative member interests are not only economic, which implies that harmonization of cooperative laws by directives, if ever envisaged, could not be confined to the financial aspects of cooperative regulation, but should take into consideration non-financial profiles as well. On the great variety of cooperative laws in Europe see FICI “Cooperative Identity and the Law”, forthcoming in *European Business Law Review*, 2013, n. 1.

⁹ There are no harmonization directives on cooperatives. Cooperatives are rarely dealt with in company law directives, and mainly with the view of allowing MSs to exempt cooperatives from their application: see art. 1(2) of the Second Council Directive 77/91/EEC of 13 December 1976, on the formation of companies and the maintenance and alteration of their capital, last amended by [Directive 2009/109/EC](#) of 16 September 2009, where it states that “the Member States may decide not to apply this Directive to ... cooperatives incorporated as one of the types of company listed in paragraph 1. In so far as the laws of the Member States make use of this option, they shall require such companies to include the words ... ‘cooperative’ in all documents indicated in Article 4 of Directive 68/151/EEC”; art. 1(2) of the Third Council Directive 78/855/EEC of 9 October 1978, concerning (domestic) mergers of companies, amended several times and finally repealed and replaced by the codifying [Directive 2011/35/EU](#), stating that: “The Member States need not apply this Directive to cooperatives incorporated as one of the types of company listed in paragraph 1. In so far as the laws of the Member States make use of this option, they shall require such companies to include the word ‘cooperative’ in all the documents referred to in Article 5 of Directive 2009/101/EC”; art. 1(14), 3(4)(b) of the Eight Council Directive 84/253/EEC of 10 April 1984, on auditors, repealed and replaced by [Directive 2006/43/EC](#) of 17 May 2006 on statutory audits of annual and consolidated accounts, which thus tries to adapt the regulation of the audit to the specificities of the cooperative movement, especially in some countries.

¹⁰ See First Council Directive 68/151/EEC of 9 March 1968, dealing with compulsory disclosure of documents and particulars by companies, the validity of the obligations entered into by a company, and the nullity of the company, now repealed and substituted by the codifying [Directive 2009/101/EC](#) of 16 September 2009.

¹¹ The main arguments in favor of this ambitious program of harmonization of domestic company laws were the reduction of costs associated with cross-border activities and the concern about a “race to the bottom” which might follow from regulatory arbitrage/forum shopping compelling states to make their company laws less restrictive: see ARMOUR, RINGE, “[European Company Law 1999-2010: Renaissance and Crisis](#)” (December 14, 2010), *ECGI - Law Working Paper* n. 175/2011, and *Oxford Legal Studies Research Paper* n. 63/2010.

¹² Retired by COM(2001) 763 final/2 of 21 December 2001.

¹³ Cf. ARMOUR, RINGE, p. 4. See the [Feedback Statement](#) of 15 November 2011 from the EC, which provides the summary of responses to the green paper on the EU corporate governance framework. The 13th OPA [Directive 2004/25/EC](#) of 21 April 2004, on takeover bids, which mentions cooperatives in art. 11 (7), which explicitly excludes the application of the rules in art. 7 to cooperatives; the proposal for a 10th Directive retired by COM(2001) 763 final of 11 December 2001, but then cross-border mergers [Directive 2005/56/EC](#) of 26 October 2005, on cross-border mergers of limited liability companies, last amended by Directive 2012/17/EU of 13 June 2012. This last directive deals with cooperatives in art. 3 (2), which states: “Member States may decide not to apply this Directive to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of ‘limited liability company’ as laid down in Article 2(1)”.

In the new millennium the process has restarted, but apparently on new bases. In particular, the EU strategy regarding company law has changed following the Action Plan of 2003, which was in turn based on the Report of 2002 from the High Group of Company Law Experts¹⁴. Harmonization commenced to be considered not an end in itself but an instrumental good, to be valued for its capacity to improve the efficiency of business functioning¹⁵.

This led to a minimalist approach to European company law: Harmonization directives should be adopted only as far as, and to the extent that, this is desirable for firms and should mainly concentrate on cross-border issues in the name of subsidiarity. Furthermore, the new approach should involve the major use of default rules and options, implementing the idea that EU legislation should enable and not limit national legislatures¹⁶.

Along the same lines, EU legislation should concentrate on the parties' freedom to select the applicable law, in order to foster competition among Member States (MSs) to ameliorate their national laws, in order both to avoid national business migration (passive competition) and to attract foreign businesses (active competition)¹⁷. The expectation is that this strategy might lead to the approximation of company laws, although following a different route, which is bottom-up rather than top-down, as in the case of directives.

To reiterate, this new strategy – recently under renewed review, since earlier this year the EC launched a new public consultation on the future of EU company law, the results of which are presented in a report of July 2012¹⁸ – shows a shift from a top-down approach to harmonization to a bottom-up approach, which probably reflects a less optimistic view of European integration. Difference exists in company law across Europe, and apparently MSs do not wish to unify the various laws. Therefore, the only possibility for EU institutions is to explore indirect ways of harmonizing, the success and results of which are however uncertain.

As for EU legal forms of business organization, Council Regulation (EC) n. 2157/2001 of 8 October 2001, on the Statute for a European company (SE), is the inevitable result of this new climate. As this paper will point out with regard to the SCE, the SE – due to the considerable amount of references to national company law – may hardly

¹⁴ See [Report](#) of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002; [COM\(2003\) 284 final](#), of 21 May 2003.

¹⁵ See, in these terms, ARMOUR, RINGE, cit., p. 2.

¹⁶ [Directive 2007/36/EC](#), of 11 July 2007, on certain shareholder rights in listed companies. This directive deals with cooperatives in art. 1(3)(c), stating that MSs may exempt cooperative societies from this directive; [Directive 2012/17/EU](#), of 13 June 2012, on the interconnection of central, commercial and companies registers.

¹⁷ This was favored by the EUCJ case law on freedom of establishment (beginning with *Centros* in 1999). ARMOUR, RINGE, cit., p. 6-16, provides a useful and complete review of the most important decisions of the Court of Justice of the European Union on the company freedom of establishment, from *Daily Mail* in 1988 to *Cartesio* in 2008. Now *Vale* [EUCJ, 12 July 2012, C-378/2010](#), which states: "Articles 49 TFEU and 54 TFEU are to be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company". Is it the end of history for the corporate mobility issue? This makes useless the provision of transferability of the registered office in the SE and SCE Rs, which moreover are cumbersome regulations.

¹⁸ See the EC's feedback statement "[Summary of responses to the public consultation on the future of European company law](#)".

be seen as a fully pan-European legal form. Its structure, therefore, seems to be more apt to favour indirect approximation of company laws by horizontal competition among MSs rather than by vertical competition between EU law and national law¹⁹.

Redirecting the attention to cooperative law, the obstacles to harmonizing by directives are even bigger if one considers the following aspects.

First and foremost, differences in national cooperative laws are great: they do not only regard general legislative features or minor aspects of the regulation, but the very concept of a cooperative. Probably the only uniform rule in Europe is that on capital variability. Not all cooperative laws in Europe recognize cooperatives as user-owned business organizations or as democratic organizations; not all cooperative laws in Europe provide for a certain (non-capitalistic) manner of profit distribution in cooperatives; not to mention more subtle matters, such as the compulsory allocation to reserves and the devolution of residual assets in the case of dissolution, where variety is even greater²⁰.

Secondly, the cooperative movement would not be in favour of such a process. It thinks – and is probably right – that EU institutions do not know cooperatives and therefore that a top-down harmonization would cause big disasters.

Thirdly and consequently, as already pointed out with regard to company law, the EC does not wish to harmonize by directives if harmonization is not appreciated by the very firms, or representatives of firms, whose regulation is to be harmonized.

3. The SCE Regulation and its role in the approximation of European national cooperative laws

All this said, this paper can return its focus to the SCE Regulation. This paper now briefly describes it, points out its virtues and above all its weaknesses, and discusses the role it might play from a harmonization perspective.

The SCE is an EU legal form, like the European Economic Interest Grouping (EEIG) and the SE, explicitly thought by the EU legislature (as shown in the SCE Regulation preamble) for cooperatives wishing to expand their business cross-border or for cooperatives of different MSs wishing to unite themselves into a secondary cooperative or by merging²¹. In reality, the SCE is a legal form also available to individuals and non-cooperative entities, as clearly results from art. 2 of the SCE Regulation.

¹⁹ Which raises the questions: May horizontal competition occur without vertical competition? Is vertical competition (EU law vs national law) a precondition for horizontal competition? This point has not been fully developed by scholars who write on this topic, and would deserve greater consideration.

²⁰ On all these aspects, see FICI, "[Cooperative Identity and the Law](#)", *Euricse Working Paper* n. 23|12.

²¹ See respectively R 1435/2003, recital 2 where referring to the need to adapt the structures of production to the Community dimension and to allow companies of all types to reorganize their business on a Community scale; R 1435/2003 recitals 3 and 11 where referring to group of companies and cross-border cooperation between cooperatives.

The EU legislature's assumption was that the EEIG and the SE did not suit coops²². In reality, the image of cooperatives *vis-a-vis* capitalistic (for-profit) companies was also at stake, which justifies the particular insistence on the cooperative distinguishing features in the preamble to the Regulation²³.

The SCE is an optional legal form²⁴; it can be considered the 28th model of cooperative in Europe. Provided that the cross-border requirement is met (but this requirement can easily be circumvented)²⁵, this legal form, as previously observed, can be opted for by EU nationals and legal bodies (not only cooperatives).

Substantially, but this paper will come back to this statement, the SCE Regulation provides for a model of cooperative that is in line with the ICA Principles, although some interesting innovations are present, e.g., the possibility to derogate from the one member, one vote rule (within certain limits) (art. 59) and the admissibility of investor (non-user) members (whose total voice is subject to limits in order to prevent the cooperative from being controlled by this category of members) [art. 14(1) and 59(3)].

The most important characteristic of the SCE Regulation in view of the discourse on cooperative law in Europe and the harmonization issue, is that it is not, in fact, an independent, fully pan-European statute.

Indeed, the SCE Regulation contains 101 explicit references to the national law of the country of an SCE registration, plus a general mention (in art. 8) of national law as a source of regulation of an SCE for what not provided by the SCE Regulation.

This means that:

- a. a truly EU cooperative does not exist: we have, in fact, 27 SCEs as the number of MSs²⁶;
- b. it is not certain that the European cooperative complies with the ICA Principles (or the ideal image of a cooperative) because it mostly depends on the legislation of the State of incorporation; e.g., the disinterested distribution of residual assets in case of dissolution (if we take it as a distinguish trait of the cooperative identity) does not apply to all SCEs, because a SCE may set out in its statutes an alternative arrangement "if permitted by the law of the MS" (art. 75 SCE R);
- c. however, the interesting innovations contained in the SCE Regulation can be employed by the SCEs only if their State of incorporation does not impede that ("if the law of the MS so permits or does not provide otherwise")²⁷. This makes the

²² See R 1435/2003 recitals 4, 5, 6, and 12.

²³ See R 1435/2003 recitals 7-10.

²⁴ See R 12435/2003 recital 20.

²⁵ See art. 2 R 1435/2003, where, in enumerating the methods of formation of an SCE, it refers to natural persons resident in at least two MSs (1st indent); companies, firms and other legal bodies resident in, or governed by the law of, at least, two different MSs (2nd and 3rd indents); cooperatives governed by the law of at least two different MSs (4th indent); or a cooperative that for at least two years has had an establishment or subsidiary governed by the law of another MS (5th indent).

²⁶ More precisely, 30 SCEs, as the SCE R also applies to Iceland, Liechtenstein and Norway as European Economic Area (EEA) countries.

²⁷ See e.g. the determination of voting power in proportion to the cooperative activity; art. 59(2) SCE R. states: "If the law of the Member State in which the SCE has its registered office so permits, the statutes may provide for a

SCE a less attractive alternative than the national law cooperative in countries where cooperative law is not sufficiently developed or is very restrictive;

- d. the system of sources is very complex, as it results from the interplay of EU law, national law and self-regulation (art. 8);
- e. costs of compliance are exacerbated by absurd provisions. Absurd is the minimum capital requirement of 30,000 EUR [art. 3(2)]: it cannot be found in any legislation in Europe; it even contradicts the escape from the rule of the minimum capital which is lately regarding company law;
- f. all this affects the possibility of a regulatory arbitrage between national cooperative law and EU law, which is a precondition for a regulatory competition between EU law and national law, which is in turn the indirect way through which harmonization can be sought by way of an instrument such as the SCE Regulation.

All this is confirmed by data. Only 25 SCEs established in six years, some of which are probably shell SCEs (the Slovakian ones).

We have little evidence of national lawmakers following the SCE Regulation for competitive reasons²⁸.

This is consistent with the theoretical assumption that an incomplete, non-autonomous EU regulation does not foster regulatory arbitrage nor push national legislatures to change their laws.

In conclusion, it seems that the SCE Regulation cannot (not even indirectly) contribute to the approximation of cooperative laws in Europe, unless it is modified to be rendered more effective from an operational point of view (beginning with the reduction or elimination of the minimum capital requirement; the elimination of the cross-border requirement; the simplification of the system of sources; more autonomy from national laws).

4. The symbolic value of the SCE Regulation and the potential harmonizing effect of EUCJ 8 September 2011

The negative evaluation of the SCE Regulation as an operational tool and therefore as a factor of cooperative law approximation in Europe, must be accompanied, however, by the acknowledgment of its undeniable "symbolic" value, which however must not be overemphasized.

We have evidence of this in the abovementioned decision of September 2011 of the Court of Justice of the European Union. In this decision, the SCE Regulation assumes a decisive role for the Court to state the compatibility with EU law (more specifically with state aid regulation) of a different (and more favourable) tax treatment of cooperatives as compared to other business organizations.

member to have a number of votes determined by his/her participation in the cooperative activity other than by way of capital contribution. This attribution shall not exceed five votes per member or 30% of total voting rights, whichever is the lower".

²⁸ Germany is probably the only exception in this regard.

However, this decision needs to be fully read. It holds compatible with EU law only those measures dedicated to cooperatives holding under national law the general characteristics that the SCE Regulation attributes to European cooperatives. Therefore, a specific and more favourable national tax law treatment of cooperative would be legitimate under EU law only if under the national law in question cooperatives have the distinguishing features the EUCJ extracts from the SCE Regulation. This must not be taken for granted, but must be verified on a case-by-case analysis.

This may encourage national States and national cooperative movements to provide a specific national regulation and tax treatment of cooperatives.

Can this judgement turn out to be an effective instrument of cooperative law approximation? Which, moreover, would opportunely point to harmonizing the "core" of a cooperative, namely, its distinguishing features as compared to other business organizations?

5. Cooperatives ignored: The recent CCCTB case

This paper has already referred to the proposal for a directive on a CCCTB.

The EC's proposal aims at establishing a common consolidated base for taxation (CCCTB), through specific rules that companies or groups of companies may adopt to calculate their consolidated tax base.

The rules issued by the Commission: i) are facultative and alternative to the rules provided for by national law; ii) do not refer to the harmonization of tax rates, which is inherent to the member States tax sovereignty; iii) are applicable to many different kinds of companies including cooperatives.

Although applicable to cooperative enterprises (see Annex 1, point *m*), the common system determining the tax base does not take into account in any way the special features of cooperatives, establishing a common regime for all the different kinds of companies.

In particular, two articles of the CCCTB legislative proposal provide for an unreasonable and unfair treatment for cooperative enterprises.

Art. 15 establishes that "benefits granted to a shareholder who is an individual, his spouse, lineal ascendant or descendant or associated enterprises, holding a direct or indirect participation in the control, capital or management of the taxpayer, as referred to in Article 78, shall not be treated as deductible expenses to the extent that such benefits would not be granted to an independent third party". Art. 15 is evidently unreasonable if referred to cooperatives enterprises, since the main aim of cooperatives is the very production of benefits for their members.

Art. 14, par. 1, let. c) qualifies as non-deductible expenses "the transfer of retained earnings to a reserve which forms part of the equity of the company", contradicting the tax regime currently applicable in several member states to the reserves established by cooperative enterprises.

The above mentioned rules put in serious danger the favorable treatment for cooperatives established by several national systems of taxation given that, “where a company qualifies and opts for the system provided for by this Directive it shall cease to be subject to the national corporate tax arrangements in respect of all matters regulated by this Directive unless otherwise stated” (art. 7).

Therefore, if the CCCTB regime is not modified, it will be impossible to reconcile the new regime proposed by the Commission and the national rules concerning the taxation of cooperatives.

EU lawmakers should take into greater consideration biodiversity in the market; they should know that business organizations are not only those which aim to the distribution of profits; they should adapt the regulation to the specific characteristics of not-for-profit business organizations such as cooperatives and social enterprises at large.

6. Conclusions

The SCE Regulation is currently under review. The procedure started three years ago and the author’s belief is that the result will be that everything will remain unchanged. There is no pressure by national legislatures. The EC is waiting for an initiation by the cooperative movement, which has not happened, maybe because, as stated, this is too nation-driven or because the issues at stake (and their relevance) are not entirely clear.

A campaign to raise public awareness about the potential advantages of the SCE would help. It should highlight for example that the SCE is the only EU legal form which citizens may make use of (as long as the European Private Company will not be adopted²⁹).

In general, the issue of cooperative law harmonization requires answers to these questions: Why harmonize? How to harmonize? What to harmonize? Once these are answered, a more precise voice might circulate, which perhaps could be heard by the relevant stakeholders³⁰.

Comparative legal studies are necessary at least to increase cooperative visibility. Apart from the need to change the EU legal environment on the basis of an adequate knowledge of national cooperative laws, it seems incredible that in European legal reviews one finds only a handful of articles on the SCE and more generally on

²⁹ The project regarding this new type of European company does indeed include individuals among the potential founders of an SPE: see art. 3(1)(e), COM(2008) 396/3.

³⁰ A possible basis for harmonization through both regulations and directives is also (the more general provision in) art. 114 TFEU (ex art. 95 TEC) in the chapter on the approximation of laws, which states: “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”. Art. 26 TFEU stipulates: “The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties”.

cooperatives. The recently established Study Group on European Cooperative Law (SGECOL) may help in the direction of fostering comparative legal studies on cooperatives³¹. Other initiatives should be promoted; also by the cooperative movement³².

The hope is that all this might help promote cooperatives, which are a necessary part of a pluralistic market, whose virtues have been highlighted by prominent economists³³, and are consistent with the idea of common market and economic growth officially envisaged by the EU. Therefore, being in theory an essential element of the EU strategy, cooperatives need in practice to be properly understood and regulated at the EU level. MSs and European scholars aware and convinced of the virtues of cooperatives must assume the burden of pushing relevant European institutions and reluctant MSs in this direction.

³¹ See for information on the composition, projects and methodology of this Group, FAJARDO, FICI, HENRÏ, HIEZ, MÜNKNER, SNAITH, "[New Study Group on Cooperative Law: 'Principles' Project](#)", *Euricse Working Paper* n. 24|12, in www.ssrn.com, forthcoming in Spanish in *Revista de Derecho de Sociedades*.

³² See CRACOGNA, FICI, HENRÏ, *International Handbook of Cooperative Law*, Springer, forthcoming.

³³ Cf. STIGLITZ, "Moving Beyond Market Fundamentalism to a More Balanced Economy", in *Annals of Public and Cooperative Economics*, 2009.