THE GENERAL INTEREST COOPERATIVES: A CHALLENGE FOR COOPERATIVE LAW

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This article elaborates the concept of a general interest cooperative and considers the issues that relate to establishing a suitable regulatory framework to accommodate this cooperative. The principles of autonomy and self-help means that cooperatives usually develop in a different way than other non-capitalist organizations, such as philanthropic ones. However, in the past few decades, many countries have experienced the development of a new kind of cooperative, targeted at general interest or community needs. These cooperatives are usually subject to special regulations, even if the general cooperative law is also applicable to them. However, their nature remains unclear, and is somewhat controversial, since they challenge the conception of a cooperative as an organisation built around its members. The recent focus on social enterprise and its attention to social purpose, risks distancing policymakers from cooperatives. This makes it necessary to elaborate the legal nature of general interest cooperatives. The intention is to ensure that regulation is suitable for this type of cooperative and to allow cooperatives to remain an umbrella vehicle for most social enterprises. To achieve this goal this paper will consider the general definition of cooperatives, and more specifically the definition of general interest cooperatives, and the way that membership, democratic governance and economic participation apply to them.

1. Introduction

The legal recognition of cooperatives began in the 19th century and developed in the beginning of the 20th century. Cooperators in most countries struggled to get legal status for cooperatives, not because they were keen to be regulated, but so that they were able to obtain public support. International organisations have since recognised that cooperative law is the basic ingredient needed to build cooperative friendly policies.[1] With the evolution of sources of law, including international law, the development of regional institutions and worldwide academic collaborations, there has been a trend; particularly in Europe towards

[1] ILO recommendation no193, 2002, Promotion of cooperatives.

elaborating legislation using a principles based approach.[2] In this context, the scientific group on European cooperative law (SGECOL) was established in 2011 to draft the principles of European cooperative law (PECOL).[3] The methodology used by the group to develop the principles is described elsewhere.[4] However, the purpose of PECOL was to propose a common cooperative identity, and describe its main legal consequences. The PECOL comprises five chapters, dedicated to cooperative identity, governance, financial aspects, auditing and grouping. While they may look like legislative provisions, they do not claim to be law. Commentary accompanies each principle explaining its origin and meaning when applied in each of the considered jurisdictions. In this domain, PECOL is the only supra-national instrument that can be relied on to foster legal thinking on cooperatives. Therefore, it will be the starting point for this analysis, but there will also be consideration of cooperative laws from some national jurisdictions.

The general interest cooperative was focus of most of the debates during the elaboration of PECOL.[5] Although the debate is not new (as we will see below), no clear terminology had been fixed, and the concept of 'general interest' cooperative was settled upon by SGECOL to describe this cooperative type. The reality that was recognised was the emergence of cooperatives aimed at satisfying the needs of the community. There have been strong disagreements among scholars about the validity of extending the scope of cooperation to include this new phenomenon. The solution that was incorporated into PECOL by consensus, after many amendments, was to recognise the general interest cooperative as a special and singular cooperative, apart from the traditional cooperative. Among the members, I was personally (although not alone) in favour of taking the initiative further, to elaborate a more inclusive definition of a cooperative. This paper will explain my reasons for promoting this controversial solution.

I will argue that it is necessary to accommodate these general interest cooperatives in cooperative law. Firstly, because of the emergence of new kinds of cooperatives and secondly, because of the increasing focus on social enterprise. I will then propose a way to integrate these cooperatives in cooperative law, and this refers to the definition of a cooperative, as well as some analysis of their legal regime. In defining a co-operative, the clash between members' interest and the general interest is considered and this will lead to the need to discuss whether cooperatives are procedural or substantive in nature. It is possible to link the new kind of cooperative with its predecessors, but the devil is always in details. The main difficulty is to find a suitable regulatory framework inside cooperative law. Three of the cornerstones of cooperative principles present difficulties in this respect: cooperative autonomy, their democratic control, and the economic participation of members. This will lead to the drawing of some conclusions.

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[2] The elaboration of European principles has become a major activity for law scholars in Europe, especially in private law, in order to impulse approximation of national legislations through soft law. The first and most famous topic is contract law, that remains the model for any other academic research.

[3] The author of this article was a member of the group. Therefore, the first person will be used when it will be necessary to make transparent the opinion of the author into the group, which sometimes differs from others.

[4] G. Fajardo, A. Fici, H. Henry, D. Hiez, H.-H. Münkner, I. Snaith, 'New study group on european cooperative law: "principles" project', EURICSE working paper n 024/12. G. Fajardo, A. Fici, H. Henry, D. Hiez, H.-H. Münkner, I. Snaith (Ed.),*Principles of European Cooperative Law*, Intersentia, 2017.

[5] For the relevant PECOL provisions, see the annex.

2. The emergence of new kinds of cooperatives

In spite of the diversity of contexts, all continents have experienced the development of cooperatives targeted mainly or exclusively at the pursuit of the interest of the community. It is helpful to give some examples in order to grasp the core features of these cooperatives. These examples are not only European, since the phenomenon arises worldwide.

Social cooperatives in Italy. These social enterprises are expressly recognised as cooperatives by the Italian law.[6]. The ICA also considers them as one way that cooperatives comply with the seventh principle, concern for community[7].

Solidarity cooperatives in Québec. The solidarity cooperatives are cooperatives that comprise user members as well as employees and other stakeholders. As with Italian cooperatives, their object is to meet the interests of the community through any activity, but they usually include more than one category of member: users, employees, or other stakeholders who wish to support the cooperative's object. They appear to be very successful, with reports that more than nine out of ten new cooperatives in Québec are solidarity cooperatives.[8]

Solidarity economy in Latin America. Latin America relies on a significant number of cooperatives in many sectors. During the last few decades, social movements have played a significant role in political and economic changes. Cooperatives have evolved. In many countries, traditional cooperatives have been challenged by new ones, the former being accused of complicity with previous non-democratic political institutions. These new cooperatives do not necessarily benefit from special regulations, but they are characterised by common features, added to the traditional ones, such as strong integration into local communities, and emphasis on social, cultural and political emancipation. [9]

Asian cooperatives. A similar evolution for cooperatives has occurred in Asia, especially in Japan, where cooperatives have a longer tradition.[10] Since the 1980s, new types of cooperatives have emerged, delivering social services.[11] These are sometimes referred to as 'non-profit co-operative' enterprise.[12]. There are also representative types of workers' collectives providing social personal services, such as

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[6] Italian Law n 381-91. R. Lolli, Social cooperatives in the context of recent Italian regulation, in D. Hiez (Ed.), *Droit comparé des coopératives européennes*, Larcier, 2009, p.73. A. Thomas, 'The rise of social cooperatives in Italy', Voluntas (International Journal of Voluntary and Nonprofit Organizations), 2004, vol. 15, no.3. J. Defourny & Nissens M., 'Social co-operative, when social enterprises meet co-operative tradition', Journal of Entrepreneurial and Organizational Diversity, 2013, vol. 2, issue 2, 11-33.

[7] International Cooperative Alliance, 'Guidance notes to the co-operative principles', 2015, p. 87: https://ica.coop/en/blueprint-themes/identity/guidancenotes.

[8] See further at http://p2pfoundation.net/Solidarity_Cooperatives.

[9] P. Guerra & S. Reyes, *Economia Solidaria, Cooperativismo y Relaciones Laborales*, 2014, Fundacion de Cultura Universitaria, Montevideo.

[10] A. Kurimoto, 'Japan', in D. Cracogna, A. Fici & H. Henry (Ed.), *International handbook of cooperative law*, Springer, 2013, p.503.

[11] M. Sakurai & S. Hashimoto, 'Exploring the distinctive features of social enterprise in Japan', EMES Conference selected papers series, ECSP-T09-14

[12]. Ibid.

child-care and comprehensive care services for the elderly and disabled. These organisations do not have a specific legal structure, even if they are close in form to cooperatives.

These examples are superficial and provide an illustration of a general evolution. The development of these new cooperative types runs parallel to another recent evolution: the generalisation of a new concept, if not a new reality, the 'social enterprise'. These two phenomenons are both close and conflicting, so that it is necessary for me to explain the concept of social enterprise in this context.

3. The focus on social enterprises

It might be surprising to find some consideration of social enterprise in a paper dedicated to general interest cooperatives, since the two notions differ and do not refer to the same reality in the various continents. However, some connections are obvious. For example in Italy, social cooperatives are one of the first expressions of social enterprises in Europe. Because of the possibility for misunderstanding, it is important to explain some points about social enterprise that might be helpful when considering the analysis of general interest cooperatives.

To speak of 'social enterprise' is confusing, since the word refers to various traditions and realities all over the world.[13] However, the terminology is increasingly popular, especially in the European Union.[14] The concern is that it might be treated as a competing notion to cooperatives, in public policies as well as in law. For this reason it is important to consider this trend, and if possible, to establish bridges between social enterprises and cooperatives to avoid the former superseding the latter.

The notion of 'social enterprise' was created in the United States in the 80's.[15]. It covered different realities and meanings, however all were related to philanthropic institutions in the market, either promoting new forms of action, or using private funds to compensate for the reduction of public funding under the influence of neo-liberalism. The concept was later transferred to Europe, and Asia.[16]. The emergence of the notion of 'social enterprise' in Europe is interesting, as it has produced strong institutional, political and academic debates. The concept of social enterprise is contested in countries that are already based on the social economy tradition. In these countries, the social economy is designated as

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[13] A. Mystica, 'A comparative look at international approaches to social enterprise: public policy, investment structure, and tax incentives', William Mary Policy Review (2016), volume 7:2. G. Galera & C. Borzaga, 'Social enterprise: an international overview of its conceptual evolution and legal implementation'. Social Enterprise Journal, November 2009.

[14] C. Borzaga & J. Defourny (Eds.), *The emergence of social enterprise*, Routledge, 2001. (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.

[15] M. F. Doeringer, 'Fostering social entreprise: a historical and international analyses.' Duke Journal of Comparative International Law, 2010, vol. 20, p.291.J. Defourny & M. Nyssens, 'Approches européennes et américaines de l'entreprises sociale: une perspective comparative', Revue internationale d'économie sociale (RECMA), 2011, n319.

[16] I will not deal with the Asian context, due to a lack of direct knowledge. I mention it only since it is an important stream in academic research. It seems that Asia is influenced both by the two other traditions or, at least, has provided enterprises comparable to the American and European ones, with their own specificities. For some legal considerations, see for example: Z. G. Cao Fan, 'The practical foundations and methods of transformation from non-profit organizations to social enterprises in China.', China Legal Science, 2017, volume 2. For India, N. Vinod Moses, 'Wondering which legal structure to choose for your social enterprise.', 2014, https://yourstory.com/2014/02/egal-structure-choose-social-entreprise/

the third sector, alongside the public and market economies. Because social enterprise claims to use traditional business tools to achieve social goals, they are suspected to be an instrument for commercial enterprises to pervert the social economy.[17]. This suspicion has made it difficult for diverse enterprises to engage in any dialogue and cooperation. [18],.
The merit of the concept of social enterprise should not be underestimated when elaborating a common terminology for these diverse European traditions.[19]. If cooperatives are present in most countries, the scope of enterprises with which they share common values and, therefore, collaborate is variable. In this context, 'social enterprise' may provide for a common notion requiring European institutions to respond with new regulations. If cooperatives wish to challenge the concept of the social enterprise and its legal institutionalisation, it is necessary to have a clear understanding of the differences and similarities between them.

The major difference between a cooperative and a social enterprise is the social focus of social enterprises. Social enterprises are businesses with primarily social objectives whose surpluses are reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profits for shareholders and owners.[20] This is the reason why it requires attention in this reflection on general interest cooperatives. Social purpose does not place social enterprises and cooperatives in opposition, since cooperatives also claim to pursue that aim. Cooperatives run their activities to satisfy their members' economic, but also their social and cultural needs. Therefore, social enterprises could be considered to be 'special cooperatives'. In that respect, it is meaningful that EMES presents Italian social cooperatives as the main example of social enterprises in Europe.[21].

However, this should not obscure the specific differences between the social enterprise and the cooperative. Social purpose tends to be the single characteristic of the social enterprise. In order for an enterprise to be classified as social, it needs to prove it pursues a social objective.[22]. Regardless of whether the legal form of the enterprise is a collective or an individual enterprise, it is required and sufficient if the enterprise aims to meet a social need. The allocation of profits and the governance of the enterprise will not have any bearing on the qualification of the organisation to be a social enterprise. On the one hand, this is a strength, since it extends the scope of enterprises that may bring a benefit to the community. On the other hand, it puts aside the role of stakeholder/beneficiaries in cooperatives as well as its endogenous development and the fair allocation of its profits. In cooperative thinking, these features

[17] J.-F. Draperi, 'Economie sociale et entrepreneuriat social.' Revue Internationale d'économie Sociale (RECMA, http://www.recma.org/edito/economie-sociale-et-entrepreneuriat-social.

[18] Some opinions of American scholars may, surprisingly, confirm the European critics addressed to social enterprise. Indeed, they would fit better with the market context than corporate social responsibility, since their proponents are libertarian in their orientation, while corporate social responsibility leans toward the left liberal side of the political spectrum: A. Page & R. A. Katz, 'Is social enterprise the new corporate social responsibility?, Seattle University Law Review, 2011, volume 34, particularly pp.1379 f.

[19] D. Hiez, 'Le cadre juridique de l'entreprise non capitaliste: clef de distinction entre l'entreprise sociale et l'entreprise d'économie sociale et solidaire.I, Revue internationale d'économie Sociale (RECMA), 2013, n°327, p.95.

[20] https://centreforsocialenterprise.com/what-is-social-enterprise/ .

[21] EMES is a European network of researchers working on social enterprise; its name comes from its first research project on 'L'émergence des entreprises sociales en Europe.'

[22] (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, art. 3.

cannot be separated from the organisation, since democratic governance and economic participation represent the way in which the social objective can be reached. In other words, the main criticism of the social enterprise is that its first focus is not its members. One view is that social enterprises are a poorer instrument and the focus of European institutions on them is an attack on the cooperative specificities.

This point is important, but there are other points to consider that nuance the opposition. Importantly, social enterprise is not a legal notion, and it often remains outside the legal domain. There is considerable academic research on the best legal form to use to create a social enterprise. A recent report on the legal shape of social enterprise in Europe does not claim a European legal structure. [23]. It recognises that social enterprise is not a regulatory concept but a notion that is aimed at public policies. Therefore, a social enterprise often includes enterprises that comply with most of the cooperative principles, and, sometimes adopts the legal form of a cooperative. The diversity of traditions makes the word 'social enterprise' polysemic and provides a wonderful opportunity to distort reality and play a confusing game. The reluctance of cooperative organisations to have regard to the notion of social enterprise reinforces the gap between them and deprives cooperatives of the opportunity to influence policy on this development. If cooperatives wish to be involved and accept that they are unable to stop this development, the only possible way for them to proceed is to present the cooperative as a friendly model.

One difficult question remains, is this possible? Is *genus cooperatis* compatible with the social enterprise? This requires a discussion of the legal definition and regime of cooperatives.

4. The general definition of the cooperative and general interest cooperatives

The main argument against the inclusion of the notion of general interest cooperatives in the definition of a cooperative is their absence of any focus on the members' interest. The members' interest lies at the core of the definition of a cooperative provided in the ICA statement on the cooperative identity: 'an association of persons united mainly to meet their common economic social and cultural needs.'[24] It is also enshrined in national legal definitions. In Spain, for instance, the definition expressly refers to the objective of the cooperative: 'to satisfy its members' economic and social needs and aspirations by conducting business activities'.[25] Definitions of the concept in laws of various jurisdictions also frequently mention that these activities are carried out jointly by the members or with the members' participating as workers, consumers or providers of goods or services. The Italian definition is less explicit, but has the same meaning when stating the mutual purpose as one of its two main characteristics.[26]. The same observation can be made about German law,[27] or French law.[28]. The EU

[23] Developing Legal Systems which support Social Enterprise growth', report established by the European social enterprise law association (ESELA) in November 2015. http://www.esela.eu. The same observation can be made about the last study requested by the European Parliament Committee on Legal Affairs: A. Fici, 'A European Statute for Social Solidarity-based Enterprise.'

[24] https://ica.coop/en/what-co-operative

[25] Ley 27/1999, 16th July 1999, De Cooperativas, art. 1 1.

[26] Italian Civil Code, art. 2511.

[27] German Cooperative Societies Act, art. 1 (1).

[28] French Law n 47)1775, 10th of September 1947, art. 1.

regulation provides that the main object of the SCE is 'the satisfaction of its members' needs and/or the development of their economic and social activities'[29] Some national regulations play less attention to members' interests. Apart from the new Finish law, whose purpose is difficult to seize, the provisions in the Luxembourg,[30] and Belgian law,[31] provide examples. In both of these laws, the cooperative is defined as a company with variable capital and members. Apparently, this is flexible enough to accommodate both general interest and member-centered cooperatives. If this neutrality is accepted, such an assessment neglects the empirical tradition, which is that most cooperative law complies with the ICA definition.[32]

Despite the definition, general interest cooperatives appear in most jurisdictions and are often included in regulations. However, the provisions dealing with these new cooperatives are distinct from the general definition. Social cooperatives in Italy, for instance, are dedicated to: 'the human promotion and social integration of citizens through: *a*) the management of social-health and educational services; *b*) the carrying out of various activities – agricultural, industrial, commercial, or service – for the work integration of disadvantaged people.'[33] The lack of reference to the members in this definition clearly distinguishes it from the general one. Article 1522 of the Italian Civil Code allows special cooperatives to provide for services to non-members and function as non-mutual cooperatives. In other words, such cooperatives require a special regulation in order to be valid, since they derogate from the general definition. In French law, the community interest cooperative (*société coopérative d'intérêt collectif*, SCIC) pursues a similar aim. This regulation has been introduced in the general cooperative law[34]. Nevertheless, the same opposition with the general definition appears, even if it has only received indirect attention from scholars.[35]. The public interest cooperative in Portugal does not expressly require a specific objective but it allows public persons to participate in its membership, and the allusion to its purpose apparently does not derogate from the general definition.[36]. However, its legal regime deviates in many ways from the general rules as well as from ICA principles (see below).

When the general interest cooperative is included in the general cooperative law and does not derogate from its definition, it is because its social object is not achieved through services to non-members. This is the case for the solidarity cooperative in Québec, which is characterised by its multi-membership.[37] The law makes required adaptations for the distribution of cooperative refunds,[38] notably the exclusion of

[29]Council Regulation (EC) no 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Art. 1 (3).

[30]Law of the 10th of August 1915 on Commercial Companies, art. 113.

[31] Belgian Company Code, art. 350.

[32] In Belgium, for instance, a distinction is made between the so-called "true" and "false" cooperatives, and only the first ones may profit from provisions reserved for cooperatives.

[33]Italian Law, 8 November 1991, n. 381 on Social Cooperative, art. 1).

[34]French Law n 47-1775, 10th of September 1947, art. 19 quinquies-19 sexdecies A.

[35]D. Plantamp, 'La Société Coopérative d'Intérêt Collectif et les principes généraux du droit coopératif', Revue trimestrielle de droit commercial, 2005, 465. For some more details, D. Hiez, 'Sociétés coopératives d'intérêt collectif', Encyclopédie Dalloz, Répertoire Sociétés, forthcoming, n 108.

[36] Article 6 of the Cooperative Code, and more precisely the Decree-Law 31/84, 21 January 1984.

[37] Art.226-1.

[38] Art 226-8.

refunds for support members. A similar observation is made in relation to Spanish cooperative law. Article 106.1 of the *LeiCooperativa* acknowledges the social initiative cooperative, and describes its proper features: no profit orientation, and the specific object to provide care services or the integration of fragile employees.[39] Here, the cooperative is accommodated within general definition, and the objective is conciliated with the co-operative's member-orientation. In brief, these cooperatives do not deviate from the general tradition and, as such, do not challenge the definition of the cooperative.

Therefore, there are significant differences between jurisdictions and the major distinction is whether the law integrates the general interest cooperative into the scope of the general definition of cooperatives. The jurisdictions in which general interest cooperatives expressly deviate from the general definition of cooperatives arguably offer a more friendly position vis-à-vis social enterprises than those jurisdictions that place general interest cooperatives within the general scope and offer a more traditional approach. However, no legal system has taken advantage of the emergence of new kinds of cooperatives to renew their general definition of cooperatives.

It is interesting to look at the approach adopted by PECOL, since they claimed to elaborate principles that are common to the various European jurisdictions and are suitable for contemporary cooperatives. After some debate and different versions,[40] PECOL tried to find a nuanced and prudent solution. To achieve this end, PECOL introduced the concept of the 'general interest' cooperative. The initial debate concerned the best way to describe the social objective of such cooperatives: was it general interest, community or social utility? All terms have connotations and all have advantages and disadvantages. 'Community' was a choice because one of the main features of these cooperatives is local development. Moreover, 'community' highlights the link between the seventh ICA principle (concern for community) and these new kinds of cooperatives. Some scholars argued that community was too narrow, and that social cooperatives have a wider scope. More technically, they argued that the community was not a legal concept and that it would be difficult to determine the circle of the persons whose needs fell under the social objectives of the cooperative. 'General interest' is in that respect a better choice and is legally consistent. I was among those that preferred the vagueness of 'community' as a descriptor, because of its flexibility.

The acknowledgement of the general interest cooperative by PECOL is an innovation, since it provides a uniform concept. It could be understood as a doctrinal assessment, even if the elaboration of PECOL is not a legislative project. The general characteristics of the category of the general interest cooperative were distilled as common features from the various national cooperatives rather than being the result of a purely theoretical position. The concept is useful as a basis to conceptualise the relationship between it and the general definition. However, PECOL does not go further. The general interest cooperative remains a special kind of cooperative, with some special provisions. Neither its definition, nor these special provisions are connected with the general definition, so that it can only be analysed as a derogation from the traditional cooperative.

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[39] Ley 27/1999, 16TH July 1999, De Cooperativas, art. 106.

[40] The draft version of PECOL, presented to the public in June 2015 in Brussel ('Cooperative law: the importance of a regulatory framework at the EU level.', 9th June 2015, Brussel) contained a more innovative proposal, placing at the same level member-centered cooperatives and general interest cooperatives. The proposal received strong criticism and the draft was subsequently amended.

The other obstacle to the recognition of the general interest cooperative flows from the seventh principle of the ICA statement on the cooperative identity: 'concern for the community'. The argument is that cooperatives already target the community's interests.[41] The purpose is indirect, since the *genus cooperatis* is focused on the members' interest, but the way these interests are met implies consistency with the interest of the community.[42] Through its characteristics, including the embeddedness of members, the open door principle, the education principle and disinterested liquidation; cooperatives cannot be selfish and will meet the needs of the community. The argument is that there is no room left for general interest cooperatives, to admit them would mean that traditional cooperatives do not achieve the same purpose. One response is that they can be accommodated, i.e. there is no gap between mutual and general interest cooperatives, but instead there is a continuum. The opposing view is that the direct focus of general interest cooperatives on the community makes them different.

A solution is to seize a common definition to embrace all of these cooperatives: '*the cooperative is a society constituted by several persons, united voluntarily to meet its members' and its community's economic and social interests, by the common effort of its members and the establishment of appropriate means.*'[43] The structure of this definition is traditional, but it tries to integrate the general interest dimension inside the core of the general definition. On this basis, the general interest cooperative is not a derogation, but is a kind of cooperative, whose specificity does not rely on the nature of its members, but rather on the place attributed to non-members. It insists on a continuous thread among all cooperatives, with the use of the word 'and' between members' needs and community needs being understood as both cumulative and alternative. In other words, a cooperative may pursue both members' and community interest, and may focus on one or both of these needs. Conversely, no cooperative may fully exclude one of these two dimensions. The exclusion of the community interest would violate the concern for community principle. The exclusion of members' interest would remove the gap between cooperatives and charities.

5. The nature of cooperatives: a procedural framework or a targeted organisation?

It can be argued that the co-operative is focused on the way it runs its activity, while the social enterprise only pays attention to its purpose. Therefore, the possibility for a cooperative to pursue a general interest as its primary goal will depend upon the compatibility of its procedural features (governance and profit distribution) with the identified general interest. In other words, attention must be paid to the extent to which the cooperative's procedural organisation is linked with the pursuit of its members' needs.

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[41] For an excellent discussion of that question, notably in a historical perspective: I. Macpherson, 'Concern for the community: from members towards local communities' interests.', Euricse working paper series, 2281-8235. It is noted that the author does not deal with the debate that is under discussion here.

[42] W. Majee & A. Hoyt, 'Cooperatives and Community Development: a perspective on the use of cooperatives in development.', Journal of Community Practice, 2011, 19:1, 48-61. M.Vieta & D. Lionais, 'The cooperative advantage for community development.', Journal of Entrepreneurial and Organizational Diversity, 2015, vol. 4, issue 1, 1-10.

[43] This definition is influenced by the French cooperative definition, but its structure could be the basis for the renewal of any cooperative definition. It is the fruit of ongoing research on the drafting of an innovative cooperative law in France, under the supervision of the author, but all the members of the group have a share in it.

At a first glance, the answer seems obvious: there is a link between the social objective of the cooperative (to meet its members' needs) and its procedural regulation. The ICA definition of cooperatives requires that the objective be pursued 'through' a jointly owned and democratically controlled enterprise. In other words, conduct of the enterprise is the process by which the object is achieved. Therefore, it is not possible to separate the process from the object so that the cooperative cannot be conducted primarily to serve a general interest.[44]

However, the reality is more complex. The satisfaction of members' needs does not necessarily dominate the conduct of the enterprise in many cooperatives. Consumer cooperatives, such as banking cooperatives, usually run their activities with non-members without any limitation, or with very light ones. The justification for the deviation is that a critical mass of customers is the best way to meet the members' needs. This is an economic rather than a legal justification and you can also find consumer cooperatives who only transact with members. However, in those cooperatives transacting with non-members, there is often a focus on its democratic organisation. Therefore, it is possible to mitigate the traditional social objective, and to keep the same procedural regulations with some adaptations. This leads to a more radical question: is the cooperative, at the end of the day, more about the procedural organisation of the enterprise rather than the achievement of a specific objective? If so, the incorporation of general interest cooperative among other cooperatives should not be problematic.

This conclusion is tempting, since it would facilitate the recognition of general interest cooperatives. However, there are several reasons for avoiding this line of reasoning. Firstly, if the cooperative is an organisation that does not rely on serving a particular objective, it will appear to be simply an ideological choice and, therefore, it will be more fragile. If the procedural regulation of the cooperative is designed to achieve social objectives, the strength of the organisation derives, at least partly, from its ability to achieve that goal. If the goal vanishes, the procedure becomes an end in itself. Secondly, if the cooperative procedures are autonomous, they could easily be applied to companies, with some adaptations. Although this does occur, it can only happen when the company does not aim to maximise its profit for the benefit of its investors.

Consequently, it is not possible to deviate from the traditional definition of cooperative: it is targeted at a specific purpose, characterised by its attempt to meet specific needs, in opposition to the company's purpose. The specific purpose of the cooperative is to meet its members' and their community's needs. It has not always been necessary to articulate the communities need as part of the cooperative purpose. There was a time when individuals (the members) were not clearly distinct from their community, so that their needs and aspirations were the same.[45]. With the rise in individualism and the dilution of traditional communities, it has become necessary to make it more explicit that cooperatives are anchored in their community (local or wider depending on the cooperative), so that its purposes are also targeted to include this community.

[44] Hans-H. Münkner, *Co-operative principles and Co-operative law*, 2nd revised edition, Zweigniederlassung(Zürich), 2015, notably pp. 30-31.

[45] Looking at the first cooperatives, or reading the first thinkers, we don't find that opposition.

Despite this, the difficulty acknowledging general interest cooperatives remains. The door may be open but this possibility will only be realised if cooperative regulation accommodates the special situation of these new enterprises. The definition may include both enterprises, but is the legal regime as flexible?

6. Autonomy and cooperation with public bodies

The autonomy of cooperatives is a very old principle, and it has been strong enough to exclude many cooperatives from the ICA. It recognises that it is necessary for members to control the cooperative, and the main threat is control by the state or external investors. Apparently, the same concern does not apply to investors in general interest cooperatives. The distinction comes from the place of members and non-members inside the general interest cooperative. When the cooperative's interest is its members, they must fully control the cooperative. When the cooperative's interest belongs to the community, this raises the question of how it is to be controlled by that community. One way is to ensure its representation places some control in the hands of the state. Indeed, the state is there to safeguard the communities' general interest. But how is state control to be reconciled with the principle of cooperative autonomy?

Apart from those jurisdictions in which the state controls all cooperatives, cooperative law in some jurisdictions e.g. France and Portugal, recognises the representation of public persons in general interest cooperatives. In France, while public persons require a special authorisation to subscribe to a certain amount of capital in a company, the law allows them to do so in the community interest cooperatives.[46] In the first regulation, the maximum subscription was 20%. This limit has since been increased to 50%.[47] The amendment has been justified by the need, revealed in practice, to make these cooperatives more stable by allowing a higher participation of public persons, notably local authorities. In Portugal, public interest cooperatives (*régies cooperatives*)[48] are connected to the municipal tradition,[49] and are submitted to special provisions that derogate from some cooperative principles,[50] notably democratic governance through the attribution of rights to public persons.

In this context, it is worth mentioning régies', referred to in the writings of Bernard Lavergne, [51] which have partly inspired Portuguese public interest cooperatives. These 'régies' have many similarities with general interest cooperatives. Lavergne describes the criterion to distinguish them from other public entities: creation by public bodies, autonomous management, disinterested organisation only aimed at

[46] French law L. no 47-1775, 10th of September 1947, art. 19 septies.

[47] French law L. no 47-1775, 20th of September 1947, art. 19 septies alinéa 4, since the law no 2014-856, 31st of July 2014, art. 33.

[48] Established by article 6 of the Cooperative Code, and more precisely regulated by the Decree-Law 31/84, 21 January 1984

[49] J. Leite, 'Municipalities and social economy. Lessons from Portugal.', CIRIEC, 2015/14.

[50] The constitutional court of Portugal even stated that some provisions of the derree violate the constitution: see J. Leite, 'Cooperativas de interesse public em Portugal.', http://www.cases.pt/0_content/actividades/doutrina/cooperativas_de_interesse_publico__em_portugal.pdf

[51]Notably: B. Lavergne, « Le rapide essor des régies coopératives anglaises », revue des études coopératives, n°63, 1937, Paris, Presses Universitaires de France, ps. 177-210.

selling at cost, fixed statutory interest to the share capital (if any capital), designation of board members by public bodies or consumers.[52] There are similarities with general interest cooperatives, such as the limited return on capital, or the absence of any cooperative refund. However, some of their features are incompatible with cooperatives, especially influence of public bodies. If board members, or at least some of them, are to be selected by public bodies, their creation by a public Act makes them fundamentally different to a cooperative.

The derogations for general interest cooperatives cannot be understood without paying due attention to the special objective of these cooperatives. Indeed, when a cooperative intends to meet the community's needs and aspirations, the compliance with cooperative principles requires them to state what place is to be given to this community. A community is not a legal person, so it cannot be a member, nor can it designate who are to be its representatives. However, as cooperatives are also based on the principle of self-help, it would not be appropriate to disallow the integration of non-members users. This is probably the main reason why cooperative organisations seem to be reluctant regarding the integration of general interest cooperatives. The diverse legal innovations in national cooperative laws are oriented to multi-membership. The integration of public bodies into the cooperative should be given consideration as one way to tackle this problem. In other words, the involvement of public bodies should not be seen as a violation of cooperative autonomy, but an acknowledgement that the community is represented, or that the general interest is voiced by them. Another view is that general interest is no longer only expressed through the state, since many groups are involved in its determination. This corresponds to the increasing place given to civil society. Therefore, the state is not the only possible representative of the general interest for the local communities. Local public bodies are concerned, as are other organisations. They cannot be defined a priori, so they are abstractly designated through the category of 'persons interested in the social objectives of the cooperative'.[53] The category is wide enough to welcome many legal and even natural persons. It is up to the founders of the cooperative, as well as to the community, to decide who the appropriate representatives are in each general interest cooperative.

The traditional cooperative members are not outside this scope. Firstly, they are part of the community and may claim an equal ability to represent it. Secondly, they are involved in the enterprise and so are entitled to be members. If we agree that the cooperative cannot be solely targeted at the community, without any concern for its members, some of its representatives must also be cooperators. This reasoning leads to the conclusion that the general interest cooperative does not face intractable difficulties integrating the community into its membership. A similar conclusion may also be drawn about democratic governance.

[52] B. Lavergne, ibid., p. 108.

[53] You will find such a formula ('les personnes physiques ou morales intéressées à l'objet des sociétés coopératives artisanales') about craft cooperatives: French Law L. n 83-657, 20th of July 1983, art. 6 4°. Another formula refers to the persons who intend to take part to the achievement of the cooperative object (personnes qui entendent contribuer à la réalisation de l'objet de la cooperative': French law L. n 47-1775, 10th of September 1947, art. 3 bis. Note, that for collective interest cooperatives, the legislator does not refer anymore to a specific category but provides for a general definition. I.e. any natural or legal person who contributes by any means to the activity of the cooperative ('toute personne pysique ou morale qui contribue par tout moyen à l'activité de la cooperative'). French law L. n 47-1775, 10th of September 1947, art. 19 septies.

7. Democratic governance and multi-membership

Democratic governance is a pillar of cooperative principles and the general interest cooperative may only be considered to be a cooperative if it is compliant. However, it is not so difficult to demonstrate that they do comply, even if there are some adaptations. The democratic governance principle comprises many aspects, and it is not possible to discuss all of them here. The structure of the cooperative does not differ if it is a general interest cooperative, so that the main concern is about the 'one member/one vote' requirement.

If this is a universal requirement, there are also some derogations. It is traditional for secondary cooperatives to be an exception, but it is also true in other cases. In French agricultural cooperatives according to the French law, with some limitations, voting rights may be proportionate to the number of transactions the member has with the cooperative.[54] More generally, PECOL states that when a cooperative welcomes non-cooperator members, they may have plural voting rights according to their capital.[55] Therefore, the incorporation of special provisions for general interest cooperatives is not idiosyncratic. The key issue is to determine what kind of derogations should apply to them. Two different questions arise: the accommodation of multi-membership, and the weight of control rights to be given to public persons.

The question of multi-membership does not only concern general interest cooperatives so it should not be a serious issue. When cooperative law does allow a cooperative to have multi-membership, it usually also allows them to have different classes of members with different voting rights. In Spain, for instance, in cooperatives with different classes of members (ones with employee members,[56] investor members,[57] or integral,[58] or mixed cooperatives,[59] plural or fractional votes may be assigned to maintain each class of members' proportional rights at the general meeting in accordance with the relevant statute. The rule is similar in French collective interest cooperatives. If the principle remains one member/one vote, it is up to the statutes to provide for different voting rights for the classes of members, each member having equal voting rights in its own class.[60]

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[54] French Rural Code, art. L.524-4.

[55] Section 2.4 (10).

[56] Cooperatives other than workers' cooperatives may have employee members. Spanish law LC (article 13.4) states that if the cooperative's statutes allow this class of members, they must establish criteria that will ensure these members a fair, weighted participation in the rights and obligations, both financial and corporate [information, voting, eligibility for office]. The same rules apply to these members as to the worker members of worker cooperatives.

[57] All types of cooperatives may have investor members who do not participate directly in the cooperative activity but contribute to achieving it and may be allowed voting rights. Spanish law LC (article 14) states that the combined votes of this membership class may not exceed 30% of the votes in the organs of the cooperative.

[58] Integral cooperatives are those that fulfil the typical purposes of different classes of cooperatives within a single cooperative, as established in their statutes. The different activities of the cooperative must always be represented in its decision-making bodies (Spanish law LC article 105)

[59] Mixed cooperatives, as mentioned in Spanish law LC (article 107), are those that have members whose voting rights in the general meeting may be decided exclusively or preferentially by the capital they contribute. These members may cast up to 40% of the votes and their shares may be freely negotiable. The sum of the votes of these members and any investor members may not exceed 49% of the total votes in the cooperative.

[60] French law L. no 47-1775, 10th of September 1947, art; 19 octies.

The situation is more complex in relation to public bodies. Here, Portugal offers an example of derogations. In the case of public interest cooperatives, mentioned above, the participation of public entities in governing bodies is proportionate to the weight of their contribution to the cooperative's share capital.[61] This is a where the legislation is difficult to reconcile with cooperatives. The presence of public bodies in this example is an exception as it is connected to the concept of *régies*, and does not fit exactly with the notion of general interest cooperatives as it is understood in this paper. Indeed, if a public person is authorised to hold plural voting rights, it is argued that it is not because it is public, but because it represents the community. The community is the target of the cooperative and must be given sufficient representation in the cooperative's decision-making organs. However, as a member of a cooperative, the public body must respect the cooperative principles to the extent that this is possible. Therefore, the reasons why the public body must hold voting rights that are proportionate to its capital contribution are not clear. It is difficult for the law to determine what should an appropriate allocation of voting rights, since each cooperative transaction may have different implications for the community. The best solution is to define the general framework in the legislation and to refer to the statutes for the determination of details.

The justification of plural voting rights for pub lic bodies in general interest cooperatives leads to another observation. Since it is based on adequate representation of the community, it may equally apply to any community representative (not including. cooperators, even though they partially represent the community as their members). It may concern persons who are interested in the achievement of the social objective, such as a philanthropist or charitable organisation. This will depend on the way the community is targeted and how many representatives are cooperative members. Still, it may justify a derogation to the 'one person/one vote' principle. Given the diversity of possible scenarios, just like in the case of public persons, the law should refer to the statutes for guidance and thresholds.

In summary, the issues generated by governance of the general interest cooperative are not very difficult. It does require some adaptations to the traditional approach, but the derogations are no more serious than the ones that are already present in many cooperative laws. However, the economic dimension does raise more difficulties, since it requires a conceptual adaptation.

8. Cooperative transactions and the cooperative refund

The cooperative transaction is the transaction that the cooperative performs to achieve its social objective. Some jurisdictions do not expressly include this concept in their cooperative laws. However, even when the relevant cooperative law does not specifically refer to the concept is does include rules that implement the requirement to some extent. This is the basis for the principle of member economic participation or exclusivity. It requires that the cooperative perform transactions only, or at least mainly, with its members. In this context, transactions are those cooperative transactions that connect to its core objective. The cooperative is not prevented from engaging in ancillary transactions with non-members. For example, an agricultural cooperative does not infringe the exclusivity principle when it buys a computer from a non-member.

[61] Portuguese Decree-Law no 31/84, art. 8.1.

The notion of the cooperative transaction is an issue when identifying the services to be provided to the community and it is a barrier when trying to justify their status as a cooperative. As discussed earlier, the 'community' cannot be a cooperative member as it is not a legal person. Therefore, even if the social objective is to meet the community's needs, the community is not a party to the transactions performed to achieve that goal. For a range of reasons, it is not possible to welcome the individual beneficiaries of those transactions as members of the cooperative. For example, the beneficiaries might be individuals who do not have legal capacity. The real difficulty in this area is that from the notion of the cooperative transaction, flow concepts such as surplus and key mechanisms like the cooperative refund.

Some cooperative laws provide a solution by specifically removing these notions and mechanisms in case of general interest cooperatives. For example, the French cooperative law prevents the collective interest cooperative from distributing any cooperative refund.[62] The Italian law is less explicit, but the stronger conceptualisation of Italian doctrine elaborates consistent solutions: as cooperatives, social cooperatives comply with the general regulation of surpluses distribution.[63] However, if the cooperative is oriented to the general interest,[64] the cooperative refund is considered incompatible.[65]. As Antonio Fici suggests, the solution has to be related to the regulation on social enterprise that forbids any member of the enterprise from being enriched by the activities carried on by the enterprise, so as not to deprive the general interest from any resource.[66] However, the solution is arguably more flexible and perhaps more consistent in Italian law than in French law, since it would not prohibit the distribution of a cooperative refund when the beneficiaries of the social cooperative are also its members.[67]

In the end, inspiration may come from laws accommodating multi-membership cooperatives. In their case, it is not enough to distinguish between the financial flow coming from cooperative transactions with members and those with non-members. Rather, it is necessary to separate surpluses related to cooperative transactions carried on with the different categories of members, so that the cooperative refunds are proportionate not only to the quantity of cooperative transactions, but also to its kind. This applies to the Spanish cooperatives, the closest to general interest cooperatives. A difficulty remains in applying this approach to general interest cooperative when the community is considered as a distinct class of member. If so, arguably its cooperative transactions should be treated as cooperative transactions with non-members, with its special accounting and its exclusion of cooperative refunds. Consistently, the persons who represent the community should be treated as part of the community and should also be excluded from cooperative refunds. This solution allows coherence in the application of cooperative principles, and limits their adaptation to the areas in which it is strictly necessary.

We could go a step further, and consider the case of a general interest cooperative that has few members apart from the community and its representatives. In such a case, cooperative refunds are not meaningful

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[62] French law L. no 47-1775, 10th of September 1947, art. 19 nonies alinéa 4.

[63] Italian Law n. 381/1991 on social cooperatives, art. 3.

[64] Ibid, art. 1.

[65] A. Fici, 'Italian report', inG. Fajardo, A. Fici, H. Henry, D. Hiez, H.-H. Münkner, I. Snaith (Ed.),*Principles of european cooperative law*, section 3.11.

[66] Ibid.

[67] Ibid.

as cooperative transactions will generate very little surplus and the calculation of cooperative refunds might be more expensive than their value. One solution is to make provision in the statutes to exclude distributions where surplus is beneath a certain threshold.

9. Conclusions

The general interest cooperative may appear to some cooperators or scholars to be an oxymoron. Indeed, it does not fit properly with the traditional definition of the cooperative that is found in legislation and in the ICA statement. Regardless of criticism, the general interest cooperative already exists. The issue facing the cooperative sector is the inconsistency of cooperative laws that have not yet adapted their definition to this evolution. As a side issue, which might need revisiting, perhaps the expression 'general interest' cooperative is confusing, and the 'community interest' cooperative is a better fit.

More work needs to be done to elaborate an appropriate regulation. Some recent cooperative law reforms provide for promising provisions, but they remain disparate and require further analysis and systematisation. This paper has hopefully outlined the key issues and opened the legal debate. There is an urgent need to take this further and find solutions to ensure greater legal certainty to new cooperatives all over the world. Cooperatives claim to offer an alternative to capitalist enterprise and to oppressive public welfare. Some law reforms have adapted to the market and have not always avoided companization.[68]. More recently, different perspectives and contexts suggest that a cooperative renewal is on the way. To remain a strong model, consistent but also adapted to diverse circumstances, cooperative law must evolve, especially in the domain of cooperative principles. In many respects, cooperatives are the most powerful instruments outside of companies and the state. They can only remain attractive if they can find appropriate mechanisms to adapt and challenge the ongoing evolutions in enterprise. Some lobbyists, supported by some academics, propose to adapt the company form to include a social purpose. Some of these reforms have been achieved and may well be successful. If cooperatives think that they can do better, they must show they are community friendly. It is not enough to claim that they have always looked after the community and remain equipped to continue to do so. The diverse range of new legal models with social objectives tells a different story.

Finally, it remains crucial to establish continuity between general interest cooperatives and other cooperatives. There is a tendency to distinguish between cooperatives, depending on whether or not they pursue a social purpose. Significantly, the satisfaction of members' needs and aspirations is not treated as a social purpose. It follows that if the similarities of all cooperatives are not sufficiently emphasised, traditional cooperatives could find themselves excluded from public policies established to foster social enterprises. To avoid this misunderstanding, the right approach is not to focus on putting general interest cooperatives to one side as a distinct type of cooperative, but to demonstrate that most of their specificities are consistent with features present in any cooperative. This is why common provisions should be favoured.

[68] H. Henry, *Guidelines for cooperative legislation*, second, revised edition, International Labour Organization, 2005. H. Henry, 'Public international cooperative law', in in D. Cracogna, A. Fici & H. Henry (Ed.), *International handbook of cooperative law*, Springer, 2013, p. 65.

Annex: provisions of PECOL about general interest cooperatives

Section 1.2 Law applicable and cooperative statutes

1) Cooperatives regulated by special laws for their type of cooperative, including general interest cooperatives, are subject to the general cooperative law only to the extent that it is compatible with their particular nature.

Section 1.3 Membership requirements

(4) (…) A general interest cooperative shall always comprise no fewer than two members, regardless of whether they are cooperators or non-cooperators.

Section 1.4 Cooperative transactions

(1) Mutual cooperatives pursue their objective mainly through cooperative transactions with their cooperator members for the provision of goods, services or jobs. General interest cooperatives may also do so.

Section 1.5 Non-member cooperative transactions

(4) When mutual cooperatives carry out non-member cooperative transactions they shall keep a separate account of such transactions. General interest cooperatives may also do so.

Section 2.1 General principles on cooperative governance

(3) (…) In general interest cooperatives, they are structured to pursue such activities mainly in the general interest of the community.
(4) Cooperative governance structures may vary according to:
(…)(c) whether it is a mutual or a general interest cooperative.

Section 2.3 Members' obligations and rights

(3) The statutes of a general interest cooperative shall state the obligations and rights of cooperator and non-cooperator members, including the different roles of different groups in the pursuit of the general interest of the community.

Section 2.5 (Cooperative governance structures: management and internal control)
(5) Board composition, especially in general interest cooperatives, shall take into account the composition of the cooperative membership, including, for example, by geographical constituency or category of

member. Where substitutes have not been elected in advance, the board may have power to co-opt members to fill casual vacancies pending an election.
(6) In mutual cooperatives the majority of members of administrative and supervisory boards shall be cooperator members. The statutes of a general interest cooperative may also provide so.

Section 3.6 (Economic results from cooperative transactions with members)
(7) General interest cooperatives may not distribute cooperative surpluses to their members.

Section 4.2 Scope and forms of cooperative audit

(1) Cooperative audit includes, but is not limited to, the volume of cooperative transactions with members and with non-members; the use and results of subsidiaries; member participation in cooperative governance; member democratic control of the cooperative; the composition of assets; the origin and allocation of the economic results; the amount of the indivisible and divisible reserves; the economic sustainability of the enterprise; the existence of practices of cooperation among cooperatives and of cooperative social responsibility; the level of engagement in cooperative education and training; the manner in which the general interest has been pursued and the stakeholder involvement in general interest cooperatives.