

**CO-OPERATIVES AND EU COMPETITION LAW:  
INTERPRETATION OF CO-OPERATIVES SPECIFIC RULES**

*Co-operatives are subject to a variety of regulatory systems at national, European and international levels. Their specific nature, recognized by the Treaties and their sphere of activity in the economic and social domains, allows national adaptations so as to fulfil their missions to their members and/or the society.*

**OBJECTIVES OF THE DOCUMENT**

The objective of this document is to propose some guidance to the European Commission when applying the EU competition rules to co-operative societies, and in particular regarding state aid. It is to help the Commission services to get a better understanding of co-operative societies, of their operating principles and structures and hence to improve the fulfilment of their monitoring role. For co-operative societies this will provide for more legal security when developing their economic and social activities.

At national level there are specific domains which have to do with "sui generis" (namely not comparable) property regimes, which in turn stem from specific operational principles that characterize cooperative societies all over the world. Those principles have been enshrined in the ILO Recommendation 193 on the Promotion of Cooperatives, adopted on 21 June 2002 by most states of the world, including, inter alia, the US, Japan, and the 27 countries which are now EU member states.

The business model of co-operative societies is recognized by Article 48 of the EC Treaty and regulated in the Regulation (EC) No. 1435/2003 on the Statute for a European Co-operative Society. The regulation stipulates that cooperatives are economic agents with particular operating principles that are different from those of other economic agents<sup>1</sup>. These particular principles include notably the principle of primacy of the individual which is reflected in the specific rules of membership, resignation and expulsion, where the "one man-one vote" rule is laid down and the right to vote is vested to the individual<sup>2</sup>. It needs to be pointed out that these cooperative principles, which are enshrined in EU law, need to be respected. Nevertheless, there can be no doubt that co-operatives have to respect the principles of EU competition law like any other form of undertaking.

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<sup>1</sup> See Article 48.2 of the EC Treaty, Regulation (EC) No. 1435/2003 on the Statute for a European Co-operative Society (SCE) and Commission's Communication on the promotion of co-operative societies in Europe.

<sup>2</sup> Recital 8 of the SCE.

Each EU member state has in turn transposed those operational principles in their national legislation while adapting them to their specific legal, fiscal, economic and social environment. In some EU member states, cooperatives, as enterprises characterized by those principles, are even protected by the national constitution. This document attempts to demonstrate that these national rules define a specific and autonomous legal, fiscal and property regime which is "sui generis" and not an exception to other forms of enterprises (be they public or private).

### **WHAT IS A CO-OPERATIVE?**

"A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled ".<sup>3</sup>

This form of society is a member based enterprise, the financial surplus of which serves to meet needs or to achieve specific objectives. Indeed, like any other enterprises, co-operatives must be economically successful, although their objective is to meet the economic and social needs of their members and/or of the general interest<sup>4</sup>.

### **THE CO-OPERATIVE PRINCIPLES**

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

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

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

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

Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions.

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

Members contribute equitably to, and democratically control, the capital of their co-operative.

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

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

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

Co-operatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their co-operatives.

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

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

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

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

These principles, although stated in a general way, have very specific practical consequences. For example, the fact that membership is voluntary and open will imply that the capital is variable because new members may enter the society at any moment. Therefore, developing these principles into national Law is not to create an exception to other types of enterprises but to build an original and autonomous legal regime.

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<sup>3</sup> Statement on the Co-operative identity adopted in 1995 during the Congress of the International Co-operative Alliance in Manchester and included in ILO Recommendation 193 on the promotion of Cooperatives.

<sup>4</sup> Art 1 Rules of the European Co-operative Society 2

## **SPECIFIC PROPERTY REGIME STEMMING FROM COOPERATIVE PRINCIPLES**

The development of the co-operative principles implies the creation of a specific property regime which competition rules must therefore assess accordingly. The main consequences of those principles in terms of property regime are the following:

The capital of the society is variable as a consequence of the first principle (**Membership is voluntary and open**): each person is free to become a member of a co-operative society, which means that they become a partner of the society. And, in general, the cooperative cannot refuse membership to a new member who is eligible according to the category of cooperatives (consumers', users', workers'), in conformity with the non-discrimination principle. Thence the capital is variable because it can change at any time according to the entry of new members or their withdrawal. Another implication is the fact that majority cooperatives societies have no or limited accesses to equity market, their shares are not listed. Their economical development depends therefore on their own capital from which it follows that constitution of reserves is essential.

The voting right is not linked to the amount of subscribed capital or to the amount of the transactions carried out with the enterprise, as a consequence of the 2d cooperative principle (**Democratic management**): indeed, the member has the right to vote according to the « one person, one vote » principle;. The member has the right to take part in, vote at the General Assembly and to be elected to the management body of the enterprise.

**Dual nature of members:** The members who jointly control the cooperative (as per the definition of a cooperative) are owners of their cooperatives, but are also characterized by a specific socio-economic role (workers, providers, consumers, users etc). Only by complying with both aspects of the dual nature of members can one become member of the cooperative. The activity and the results of the enterprise therefore imply a substantially different management model from the other forms of enterprise.

**Restricted dividend rate, as a consequence of the 3d cooperative principle:** Even if the objective of the cooperative society itself is not to make profits, the cooperative has to make a surplus in order to meet its objective as defined above.. The payment of a part of the operating surplus, under the form of return on capital, in limited proportions and under restrictive conditions can however be made to the members.

**Obligation to constitute reserves:** beyond the legal obligations that concern all kinds of enterprise, co-operatives must accumulate specific reserves, namely indivisible reserves, in order to ensure the achievement of their objectives. The indivisible reserves of the co-operative society cannot be shared between the members during the activity or, in some legislation of member states, even at any liquidation. The reserves aim at achieving the objectives of the society i.e. at meeting the economic and social needs of the present and future members (in keeping with the intergenerational nature of the co-operatives) and/or of the general interest. Moreover, the indivisible reserves guarantee a stability of the co-operative shareholders' equity. Should member withdraw from the co-operatives, he/she will receive only the nominal value of their equity share capital and will not benefit from any subsequent added value

**Benefits to members in proportion to their transaction with the cooperatives (ristourne):** the operating surplus can only be allocated to each member in proportion to the activities he/she has had with the co-operative; this shows the mutual characteristic of the co-operative.

These specific property regimes are seconded in some countries by specific tax regimes. This happens to ensure the logic and coherence of the legal system.

The fact that there are different rules in different countries does not contradict what has been said. It only shows that co-operative's legal framework (including taxation) has to be adapted to the culture and tradition of the country. These specific tax regimes must be applied to all co-operatives independently of their size or sector of activity because they correspond to a specific co-operative logic.

## **EU COMPETITION RULES**

As a preliminary approach, this document will only focus on state-aid rules and taxation aspects

The fact that there are specific legal regimes for co-operative societies (civil or fiscal) cannot be considered as state-aid as such. Each national set of rules must be analysed and interpreted according to the general provisions on state-aid.

Like all other economic actors, co-operatives are subjected to EU competition rules. But it is not possible to take a simplistic comparative approach with regards to other undertakings. This means that specific regimes for co-operatives can not be easily compared to the regimes that apply to other kinds of enterprises. As mentioned above, the rules applicable to co-operative societies derive from different principles and coherence must be ensured between the rules and the principles. The specific tax regimes applying only to cooperatives and stemming from specific property and operating regimes and tends to reflect cooperatives principles. Therefore apparently favourable provisions cannot be considered – prima facie- as comparative advantages in relation to other types of enterprises which do not share the same property and operational regimes

Therefore, if a specific tax system for co-operatives is:

- in line with the logic of the country's legal and fiscal system,
- is a direct consequence of the specific property and operational regime that result from the co-operative principles,
- and reflects these specificities to a proportionate degree, it can not be considered as a state-aid. In fact it is not an "advantage" but simply a different logic.

Some concrete examples:

- If a national tax system exempts from taxation the reserves of co-operatives this is because, as stated above, these reserves can not be shared by the members in any case. For private companies reserves are taxed because it is an anticipation of future revenues of the shareholders. In the case of co-operatives this possibility simply doesn't exist. There is no future revenue. Furthermore, cooperatives face more difficulties to attract investor money. Therefore this specific property regime shared by all cooperatives requires a differentiate consideration.
- In some countries, benefits to members in proportion to their transaction with the co-operative are not taxed at a corporate level because they are not a direct consequence of the capital invested. As mentioned before, co-operative members' benefits are proportional to the activity they have with the co-operative, not proportional to the capital invested. Therefore the logic is to transfer the taxation onto a personal level instead of a corporate level.
- Some countries may oblige co-operatives to build reserves which can only be used for specific purposes (e. g. co-operative education and training). It can make sense not to impose a tax on the remuneration of the reserves because this is no financial profit but a direct allocation of funds into specific activities.

National rules concerning co-operatives which are in-line with the co-operative principles, which respect the working and management logic of co-operative and which respect the logic of the system do not create an advantage (because they are not comparable), do not discriminate (because they are applicable to all co-operative societies) if the advantages granted are proportionate. Bearing no comparative advantage whatsoever with other types of enterprises, they are no exceptions, and thus cannot be considered as state aid under the articles of the Treaty. Moreover, other types of enterprises can be transformed into co-operatives and, therefore, adopt co-operative specific rules.

In a number of domains, cooperatives need to abide by state aid rules, and in fact they do abide by those rules. This is the case, for example, in the field of tax relief granted to specific types of cooperatives that employ disadvantaged workers. In each of those cases, the measure in question can be considered as a comparative 'advantage' (even if it is a financial compensation for a social good provided) as compared to another enterprise, and is thus to be considered under the framework of competition rules.

## **IN CONCLUSION**

Co-operatives have diverse normative frameworks at national, European and international levels. They do not constitute an exception, but the application of specific operational principles  
With regard to this specific identity, the Member States - in the fields recognized by the Treaties, can therefore enact particular clauses for co-operative societies and take into account any particular constraints (if not all to the same degree) that co-operatives may have.

### **Co-operatives in Europe:**

256,000 enterprises

163 million members

5.4 million jobs