Support for Farmers' Cooperatives

EU synthesis and comparative analysis report Legal Aspects

Ger van der Sangen

The 2011-2012 project „Support for Farmers' Cooperatives" is commissioned and funded by the European Commission, DG Agriculture and Rural Development.

Contract Number: 30-CE-0395921/00-42.

The project is managed by Wageningen UR's Agricultural Economics Research Institute LEI and Wageningen University. Project managers: Krijn J. Poppe and Jos Bijman.

Other members of the consortium are:

- Pellervo Economic Research PTT, Finland: Perttu Pyykkönen
- University of Helsinki, Finland: Petri Ollila
- Agricultural Economics Research Institute, Greece: Constantine Iliopoulos
- Justus Liebig University Giessen, Germany: Rainer Kühl
- Humboldt University Berlin, Germany: Konrad Hagedorn, Markus Hanisch and Renate Judis
- HIVA Katholieke Universiteit Leuven, Belgium: Caroline Gijselinckx
- Rotterdam School of Management, Erasmus University, The Netherlands: George Hendrikse and Tony Hak

How to cite this report:

Sangen, Ger van der (2012). Support for Farmers' Cooperatives; EU synthesis and comparative analysis report - Legal Aspects. Wageningen: Wageningen UR.

Support for Farmers' Cooperatives;

EU synthesis and comparative analysis report

Legal Aspects

Ger van der Sangen

Tilburg University, The Netherlands

November 2012

Corresponding author:

Ger van der Sangen
Tilburg University
Department Business Law, Tilburg Law School
Room M630
P.O. Box 90153
5000 LE Tilburg
The Netherlands
E-mail: G.J.H.vdrSangen@uvt.nl

Preface and acknowledgements

In order to foster the competitiveness of the food supply chain, the European Commission is committed to promote and facilitate the restructuring and consolidation of the agricultural sector by encouraging the creation of voluntary agricultural producer organisations. To support the policy making process DG Agriculture and Rural Development has launched a large study, "Support for Farmers' Cooperatives (SFC)", that will provide insights on successful cooperatives and producer organisations as well as on effective support measures for these organisations. These insights can be used by farmers themselves, in setting up and strengthening their collective organisation, and by the European Commission in its effort to encourage the creation of agricultural producer organisations in the EU.

Within the framework of the SFC project this "EU synthesis and comparative analysis report – Legal Aspects" has been written.

Data collection for this report has been done in the summer of 2011.

In addition to this report, the SFC-project has delivered 27 country reports, a report on policies for cooperatives in non-EU OECD countries, 8 sector reports, 5 other EU synthesis and comparative analysis reports, 33 case studies, a report on cluster analysis, and a final report.

Table of contents

1. Introduction

1.1 Objective of the report

This report has been written in the framework of the EU-funded research project "Support for Farmers' Cooperatives". This project was commissioned by the European Commission DG Agriculture and Rural Development, and carried out in 2011 and 2012 by a large consortium of researchers from various European universities and research institutes. The main objective of the EU wide research project is to provide insights on successful cooperatives and producer organisations as well as on effective support measures for these organisations. These insights can be used by farmers themselves, in setting up and strengthening their collective organisation, and by the Commission in its effort to encourage the creation of agricultural producer organisations in the EU.

In the context of this research project, data has been collected in all of the 27 Member States of the European Union, on the evolution and development of agricultural cooperatives and producer organisations, but also on the policy measures and legal aspects that affect the performance of these organisations. These data have been one of the main sources of information for this report. In addition, other literature on the topic has been used to assess the situation in one or more EU member states or in particular sectors of the European agrifood industry.

This report provides an EU wide analysis and synthesis of the legal aspects of the creation and functioning of agricultural producers organisations and cooperatives, in particular in the field of business organisational law, the regulation of taxation of agricultural producer organisations and its members, and the regulation of competition law. The goal of this part of the study is to identify and analyse policy measures and instruments that promote or impede the creation and functioning of agricultural producer organisations, in particular cooperatives and other associations of agricultural producers, from a legal point of view. While analysing the legal aspects, this report will also address the legal aspects of the functioning and modus operandi of transnational cooperatives and shed some light on the international cooperatives[1] and the impact of EU regulations and policy measures, in particular the role and influence of the Statute for the European Cooperative Society.[2]

1.2 Analytical framework

For this EU wide research project we have developed an analytical framework about the determinants of the success of cooperatives and producer organisations in current food chains. These determinants relate to (a) position in the food supply chain, (b) internal governance, and (c) the institutional environment. The position of the cooperative in the food supply chain refers to the competitiveness of the cooperative vis-à-vis its customers, such as processors, wholesalers and retailers. The internal governance refers to its decision-making processes, the

[1] In this study, we distinguish between transnational cooperatives and international cooperatives. Transnational cooperatives are cooperatives with members from two or more member states, while international cooperatives are cooperatives operating their business activities in two or more member states. A transnational cooperative does not by way of definition have to be an international cooperative and vice versa.

[2] See Council Regulation (EC), No. 1435/2003 of July 2003 on the Statute for a European Cooperative Society (SCE), *OJ* L 207/1 of 18 August 2003 and Council Directive 2003/72/EC of 22 July 2003, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, *OJ* L 207 of 18 August 2003.

role of the different governing bodies, and the allocation of control rights to the management (and the agency problems that goes with delegation of decision rights). The institutional environment refers to the social, cultural, political and legal context in which the cooperative is operating, and which may have a supporting or constraining effect on the performance of the cooperative. Those three factors constitute the three building blocks of the analytical framework applied in this study (Figure 1).

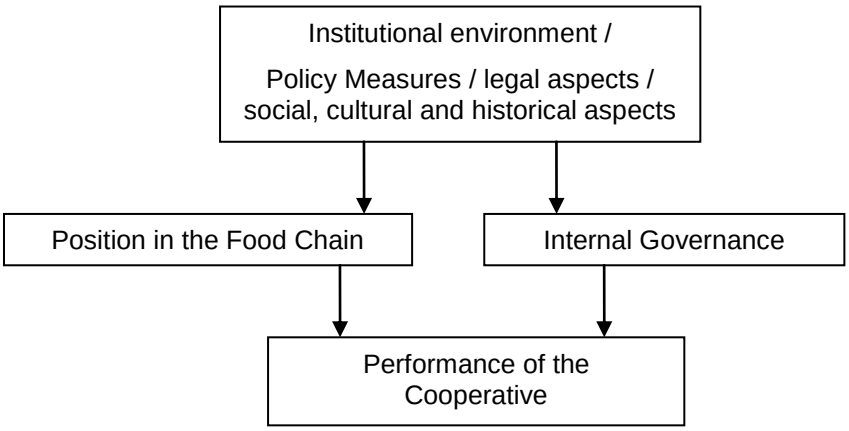


Figure 1. The core concepts of the study and their interrelatedness

1.3 Legal aspects

As indicated above, the goal of this study is to identity and analyse policy measures and legal instruments that promote or impede the efficient creation and functioning of agricultural producer organisations, in particular cooperatives and other associations of agricultural producers, from a legal point of view. This study in particular will focus on three legal areas:

- the business organisational law;
- the regulation of taxation of agricultural producer organisations and its members, and
- the regulation of competition law.

The objective of the study of these three areas of the legal aspects of cooperatives and agricultural producer organisations is to contribute to the analysis of the legal incentives or disincentives with regard to the establishment and/or the functioning of cooperatives, the analyses of the fiscal incentives or disincentives at national and or EU-level, including the transnational level between member states, and the analysis of the internal governance.

With regard to the business organisational aspects, the basic research question of this study is whether the legal structures in which agricultural producers are commonly organised, are effective and efficient vis-à-vis investor-owned firms (hereinafter: IOF). This part will collect data and analyse legal requirements with regard to a) the establishment of agricultural producer organisations – notably in the legal business form of a cooperative, b) the internal governance, c) membership and ownership structures, d) the financing of cooperative activities, e) exit-strategies, and f) reorganisations.

With regard to the tax aspect, the main research question is whether the taxation of producer organisations and its members – being either natural persons or legal persons – fosters or impedes economic growth of these organisations and their members. In particular, the question will be assessed whether agricultural producer organisations – notably cooperatives – are treated differently with regard to taxation at the level of the producer organisations and at the

level of its members vis-à-vis their investor-owned competitors and their suppliers. Taking the primary function of cooperatives into account as an aggregate of economic independent patrons (Emelianoff 1942),[3] a member state could apply pass-through taxation on the cooperative, similar to technique for levying taxes on partnerships. However, the evolution of cooperatives as wholly of partially independent enterprises has prompted legislators to tax cooperatives on the same footing as investor-owned firms.

With regard to the competition law aspects, the main research question is to what extend producer organisations are treated differently than other market competitors. Here again, taking into account one of the primary functions of the cooperative – creating bargaining power towards monopolistic market participants – the cooperative in principle does not distort competition although it does not imply cooperatives to be generically excluded from competition law regulation. However, in some member states agricultural producer organisations have become large and strong actors which according to the current national and EU-legislation on competition and anti-trust law may be in the position to distort competition. Vice versa, the question may be raised whether competition law rules should be relaxed for small producer organisations, similar to the US Capper-Volstead Act (1922), or by means of generic exemptions in EU-Regulations applicable on agricultural producer organisations for specific kinds of agricultural commodities.

1.4 Defining the cooperative

In this study on cooperatives and policy measures,. we have used the following definition of cooperatives and Producer Organisations (hereinafter: POs). A cooperative/PO is an enterprise characterized by user-ownership, user-control and user-benefit:

- It is user-owned because the users of the services of the cooperative/PO also own the cooperative organisation; ownership means that the users are the main providers of the equity capital in the organisation;
- It is user-controlled because the users of the services of the cooperative/PO are also the ones that decide on the strategies and policies of the organisation;
- It is for user-benefit, because all the benefits of the cooperative are distributed to its users on the basis of their use; thus, individual benefit is in proportion to individual use.

This definition of cooperatives and POs (from now on shortened in the text as cooperatives) includes cooperatives of cooperatives and associations of producer organisation (often called federated or secondary cooperatives). This definition will also be used while making the legal assessment in this study for several methodological reasons which will be elaborated in section 3, paragraph 2.

1.5 Period under study

This report covers the period from 2000 to 2010 and presents the most up-to-date information. This refers to both the factual data that have been collected and the literature that has been reviewed. For EU Member States that joined in 2004 and 2007 the focus is on the post-accession period.

[3] Emelianoff, I.V. (1942), *Economic Theory of Co-operation*, Washington 1942, p. 248 and 249. See also G.J.H. van der Sangen (1999), *Rechtskarakter en financiering van de coöperatie*, W.E.J. Tjeenk Willink, Zwolle 1999, p. 45.

1.6 Structure of the report

The report is structured as followed. Section 2 contains a literature review, Section 3, information on the data selection and the methodology to analyse the date as well as some remarks about the scope of the research. Section 4 is the main section of the report providing the synthesis of the legal assessment on business organisational law, tax law and competition law, as well as an assessment of the relevant legal aspects of transnational cooperatives and the European Cooperative Society and its regulatory framework. In Section 5, some policy implications of the analysis will be discussed as well as future research questions. Section 6 concludes with an inventory of the main findings of the legal aspects. References can be found in Section 7.

2. Literature review on the legal aspects of cooperatives

2.1 State of the art of legal scholarship on cooperatives

In February 2006, Kalmi wrote an essay on the disappearance of cooperatives from economic textbooks, claiming that the quality and quantity of the discussion on cooperatives is much greater in books published before the Second World War than in the post-war books. He suggested the reasons for the lost interest would include changes in the role of government, the economists and in the economics paradigm itself.[4] In legal scholarship, notably in the field of company law, tax law as well as competition law, the cooperative as an alternative to investor-owned firms gets little attention. While studying the cooperative as a separate legal entity providing promoters with a business organisational legal statute, the methodology used by legal scholars generally involves a restatement of the legal rules, norms and the legal construction of this business form. The legal analysis is made on the basis of legal sources, like national statutes or EU regulations at hand, parliamentary proceedings, case law as well as legal doctrine. The body of knowledge promulgated by legal research on the actual functioning of cooperatives, however, does not contain conclusive factual data on the driving forces that promote or impede the creation or functioning of cooperatives. Legal studies do not – at least not with regard to cooperatives – say much about the actual impact of regulations and statutes in the empirical sense of the word, since they do not assess the question whether regulations and specific rules in reality have a positive or negative effect on the efficiency of cooperative vis-à-vis IOFs. In this respect, legal academics have to relay on the outcome of existing law and economics research.[5] In the words of H. Hansmann: *'it allows us to explore the way in which legal structure – including organizational law, tax law, and regulatory law – governs organizational evolution.'*[6]

Yet, there are more intuitively and inductive claims made by legal scholars, arguing that the way cooperatives are legally organised might have a negative effect on the efficiency of the cooperative. For one, the legal structure of cooperatives is presumed to prevent cooperatives from raising sufficient equity from members and non-members, secondly the way cooperatives have to legally organise their internal governance is hampering efficient decision-making, thirdly cooperatives are presumed not to be able to distribute net proceeds taking into account the proportion of capital paid in by members, fourthly, cooperatives are presumed to have been granted too little leeway in tax law to circumvent the negative effects of the distribution of net proceeds, fifthly, cooperatives are presumed to be hampered in their economic need to be able to depart from the principles of open membership to gain control over the quality of inputs of its members, sixthly cooperatives are presumed to encounter different types of constraints with regard to doing business with members from other member states or in case business activities are set up in different member states, seventhly, cooperatives are presumed to have ineffective legal mechanisms to control the continuity of the input or purchase respectively by their members because cooperatives are presumed to have ineffective tools to prevent members from

[4] See P. Kalmi, The Disappearance of Co-operatives from Economic Textbooks, Helsinki School of Economics Working Papers W-398, February 2006.

[5] See H. Hansmann, The ownership of enterprise (1996), p. 6, claiming: 'the basic legal framework that governs different forms of enterprise ownership has developed ad hoc, without systematic thought as to the functions played by the various forms or to their interrelationships. The corporation statutes governing cooperative, non-profit, and mutual companies are generally poorly structured and vary widely from one jurisdiction to another. Tax law, which has been designed principally with the conventional investor-owned firm in mind, creates systemic biases for and against other ownership forms. And alternative forms of ownership operate under special regulatory and antitrust regimes that have never been well rationalized.'

[6] See H. Hansmann, p. 4.

withdrawal, eighthly it is argued that cooperatives lack a proper legislative structure to reorganise their business, amongst others by way of legal mergers at a national or European level, ninthly being a cooperative, cooperatives are presumed to be restricted in their efforts to decrease production costs, because they are not legally entitled to expand their business to non-members suppliers or purchasers respectively and are not legally entitled to pursue diversification activities, and finally, tenthly cooperatives are presumed to be granted too little leeway in competition law in order to fulfil their economic objective as countervailing power.

Key in this report is the question whether the aforementioned presumptions of the legal restraints can be verified on the basis of empirical evidence. Vice versa, the question may be raised whether cooperative regulations – as a whole or partially – promote and facilitate the creation and functioning of cooperatives. Remains the question why agricultural producer organisations are commonly organised in the legal business form of a cooperative whilst other business forms are available to the promoters as well.

2.2 Defining the cooperative

In paragraph 1.4, the cooperative has been defined as an enterprise characterized by user-ownership, user-control and user-benefit. This definition will also be used while making the legal assessment. For several methodological reasons, the legal definition of cooperatives cannot function as a starting point for the EU legal synthesis of the legal aspects of the factors that promote or impede the creation or functioning of cooperatives. At this point, we would like the make the following observations with regard to defining cooperatives in general and the legal definition of cooperatives in national legislature of the member states in particular.

2.3 Legal definitions and ideology

According to the International Co-operative Alliance (hereinafter: ICA), a cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise. Cooperatives should be based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity. In view of the ICA, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others. The ICA has set up 7 cooperative principles as guidelines by which cooperatives put the aforementioned values into practice. These principles include: 1) voluntary and open membership, 2) democratic member control, 3) member economic participation, 4) autonomy and independence, 5) education, training and information, 6) co-operation among co-operatives, and 7) concern for community. Although the principles of the ICA are frequently referred to by policymakers,[7] the principles have no legal binding status in the sense that European or national legislators are obliged to adhere to these principles, nor that they have an obligation to actively implement these principles into binding legal rules.

The official position of the European Commission (hereinafter: EC) on the issue is that the EC does not actively promote the implementation of the ICA cooperative principles.[8] Although

[7] See Resolutions of the United Nations, the ILO, the European Commission.

[8] See Communication from the Commission to the Council and the European Parliament, The European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe, COM(2004)18, Brussels, 23 February 2004, stating: 'The Commission invites Member States to be guided, when drafting national regulations governing cooperatives, by the "definition, values and co-operative principles" of the above mentioned Recommendations but also to be sufficiently flexible in order to meet the modern needs of cooperatives'. The recommendations referred to are the ILO recommendations that fully incorporate the ICA cooperative principles.

societal and ideological aspects currently may have been included in the European and member states' legislature, the overall denominator for the cooperative is that a cooperative is primarily viewed by its members and the European and national legislature as an enterprise that meets the three characteristics of user-ownership, user-control and user-benefit. The quintessential characteristics of a cooperative as a user-owned, user-controlled and user-benefit enterprise in particular apply to the case of agricultural cooperatives as the legal entity for their joint economic activities. Commonly, agricultural producer organisations are organised as cooperatives and operate from a legal point of view as separate legal entities with legal personality. However, other legal business forms are available as well to organise agricultural producers, as the research on the legal aspects will demonstrate. In this respect, it is worth noting that the existing legal definitions of cooperatives do not reflect the aforementioned principles or only partially. At the same time, it is highly questionable whether legal definitions of the cooperative are meant to reflect the ICA principles, for this goes beyond the scope of the objectives of company law or business organisational law.[9] It is understood in legal scholarship that company law should facilitate different types of entrepreneurial activities by providing flexible default model statutes of legal entities that meet the demands of the average end-users – in this case the agricultural producers as the promoters of the cooperative –, while at the same time providing standardised solutions to protect minority shareholders/members and to prevent abuse of the corporate form towards creditors and employees.[10] The encapsulation of ideological and societal objectives into the corporate statute is not the primary function of company law regulation.[11]

2.4 The evolution of the cooperative in law and path dependency

The second reason to abstract from the legal definitions relates to the diversity of historic origins of the cooperative and its legislation. It should be pointed out that the historic development of legislation on co-operatives is highly complex and path-dependent, leading to a large degree of differences between member states' legal regulations of the cooperative as a legal business form. At the same time, the EC does not actively attempt to approximate the national laws of its member states with regard to the laws and regulations on cooperatives.[12] With regard to cooperatives, there is no established *acquis communautaire* similar to the EU Company Law Harmonization program.[13] With respect to the approximation of the national cooperatives statutes, it should be noted that – as community law stands to date – the European Commission has no exclusive authority to put forward proposal for the approximation or

[9] See on the function of company law regulation J.A. McCahery & E.P.M. Vermeulen, *The Corporate Governance of Non-Listed Firms*, Oxford University Press 2008 and P.H.J. Essers, E.C.C.M. Kemmeren, M.J.G.C. Raaijmakers & G.J.H. van der Sangen, *Reforming the Law on Business Organizations*, Eleven International Publishing: The Hague 2011. Referring to the situation in the Netherlands, the Dutch legislator explicitly refrained from adding ideological or societal objectives in the legal definition of the cooperative and made a economic assessment of the cooperative while regulating the cooperative as a legal person. See G.J.H. van der Sangen, *Rechtskarakter en financiering van de coöperatie [The Legal Nature and Financing of the Cooperative]*, W.E.J. Tjeenk Willink, Zutphen 1999, summary in English.

[10] See R. Kraakman e.a. (Eds.), The Anatomy of Corporate law, A Comparative and Functional Approach, second edition, New York: Oxford University Press 2009.

[11] This is not to say that legal persons are not mandated by different sets of norms of social responsibility, but it is debatable whether this should be achieved through company law regulation.

[12] The 2003 EU Corporate Governance Action Plan, COM (2003) 284 of 21 May 2003, under paragraph 3.6 is inconclusive on the matter.

[13] See The 2003 EU Corporate Governance Action Plan, COM (2003) 284 of 21 May 2003, under paragraph 1.1.

harmonization of co-operative law of the member states as new proposals will be subject to the principles of subsidiarity and proportionality.

Nevertheless, the proclaimed objective of the SCE-Regulation was considered – amongst others – to provide an instrument to indirectly approximate the national laws on co-operatives in EU member states.[14] The legal basis of the SCE Statute had been contested before the ECJ, but the authority of the EC to put forward the SCE Regulation has been correctly based on the former article 308 EC-Treaty.[15] Although one of the SCE-Regulation's objectives was to indirectly approximate the law on cooperatives of the member states and the EC's authority could not be scrutinized before the ECJ, recent research on the implementation of the SCE-Regulation into the national laws of the members states has demonstrated a very trivial effect in this respect, if any.[16] This conclusion is contrary to the explicit objectives of the SCE Statute: not only to indirectly approximate the national cooperative laws, but also to increase competition between the SCE and national cooperative forms in being the most efficient instrument to organize a cooperative business activity, which – according to the High Level Group – could lead, potentially, to a lack of balance between national legal forms of cooperatives and the SCE.[17] As said, empirical studies have not revealed any vertical competition between national cooperatives and the SCE Statute in favor of the SCE.[18]

2.5 Innovations and impediments of the SCE Statute

The EC introduced the SCE Statute on the same legislative footing as the SE Statute through a regulation that referred immediately to national cooperative law for several issues through a 'renvoi'-technique, while other issues needed mandatory implementation and optional implementation respectively. Alongside the regulation, the European Council produced a directive on employee involvement rooted on the same principles as the SE-Directive, in particular the 'before and after'-principle.[19] However, the complexity of the regulation for cross-border cooperation and reorganisations for cooperative firms from different Member States has been emphasized by the fact that cooperative law in the European Union has not been harmonised at all, while national codes on cooperative firms are rooted differently, evidencing

[14] See the EC Communication COM(2004)18, p. 10 and 11. In the same vein: Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework For Company Law in Europe (Winter Report), 4 November 2002, Chapter VIII, section 1: 'The approach for the SCE has been to take advantage of the substantial work developed in the harmonisation of company law to the extent company law rules do not conflict with the peculiar traits of cooperatives. The long list of articles that call for the application of company law rules shows that the Company Law Directives can be used as instruments to complete many aspects of the Regulation on the SCE.' However, the starting point of analysis should not be company law, but the economic nature of cooperative enterprises.

[15] ECJ 2 May 2006, C-436/03 (*European Parliament vs. Council of the European Union*), ECR I-3733.

[16] See Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society, 5 October 2010, p. 78 and 79.

[17] High Level Group on Company Law Experts, Chapter VIII, section 1.

[18] The 2010 SCE-Study. See on the concept horizontal regulatory competition M.J. Roe, 'Delaware's Competition?', 117 *Harvard Law Review* (2003), p. 588 as well as S. Levmore, 'Uncorporations and the Delaware Strategy', in: J.A. McCahery et.al. (eds.), *Private Company Law Reform. International and European Perspectives*, T.M.C. Asser Press: The Hague 2010, p. 62.

[19] See on the effects of the 'before and after'-principle G.J.H. van der Sangen, The European Company and the Involvement of Employees, in: S. Dumoulin et.al. (eds.), *The European Company. Corporate Governance and Cross-border Reorganisations from a Legal and Tax Perspective*, Boom Legal Publishers, The Hague 2005, p. 169-214 and M. Gelter, 'Tilting the Balance between Capital and Labor? The effects of Regulatory Arbitrage in European Corporate Law on Employees', *Fordham International Law Journal*, Vol. 33, No. 3, 2009.

strongly the theory of path dependency.[20] Until to date, only 17 SCEs have been registered in the European Union.

With respect to the reasons for the lack of success of the SCE, it can be observed that – although the SCE Regulation seems very clear on this issue in article 78, paragraph 1 of SCE Regulation— national legislators did not take appropriate measures at national or regional level to support an active use in practice of either national cooperatives or the SCE as a business form. In most member states, the legislator merely confined itself to implementing the SCE Regulation and Directives as far as necessary, whilst a small number of member states did not implement the SCE Regulation and its supplementing Directive into national law. A second reason that the SCE is not being used in practice may be based on the dichotomy between the national cooperative statutes that follow the organisational structure of an association and which is relatively flexible, while the SCE follows the organisational structure of a company with share capital, albeit variable. Another reason may be found in the fact that the SCE is governed by different layers of legislation and provisions in the articles of association. Combined with the complex rules for employee involvement, stemming from the directive, this technique makes the SCE Statute highly inaccessible for practitioners as well as the end-users. It seems that the facilities for cross-border mergers and seat transfer did not meet the demands of cooperatives in practice. Finally, the tax implications of the SCE Statute were not considered.

The benefits of the SCE had to be found mainly in the field of facilitating cross-border legal mergers and seat transfers and cross-border cooperation between cooperatives from different member states, as well as the opportunity to opt for a one-tier board structure in a two-tier board jurisdiction, and the novelty of non-user membership with limited voting rights, in order to facilitate direct investments of equity providers. With regard to the facility of cross-border legal mergers, it seems that the demand for this facility has been absent, in particular because the regulation forces cooperatives wishing to merge to establish an SCE. It is worth noting at this point that the implemented 10th Directive on cross-border legal mergers for private companies limited by share[21] does not provide for facilities for cross-border legal merges between cooperatives from different member states. It was left to the member states to provide for rules that facilitated a merger of a SCE with a cooperative from another member state and vice versa.[22] However, the 10th Directive did not create the facility for cross-border mergers between cooperatives from different member states.

In summary, the lack of success of the SCE is caused by a lack of awareness of this cooperative form, the complexity of the SCE Regulation and the necessary implementation measures, the mandatory and complex rules for employee involvement and the absence of a specific tax regime. Combined, it makes the SCE highly impractical, whereas at the same time it is not self-evident what the specific benefits of the SCE Statute are in practice vis-à-vis national cooperative statutes.

[20] G.J.H. van der Sangen, ´Grensoverschrijdende reorganisaties van coöperaties', in: R.C.J. Galle (ed.), *Handboek Coöperatie*, Convoy Publishers: Dordrecht 2010, p. 982 and the 2010 SCE-Report, p. 78-79.
[21] Directive 2005/56/EC on cross-border mergers of limited liability companies, OJ L310/1 25 November 2005.
[22] See article 3, paragraph 2, 10th EC Company Law Directive.

3. Data and methods

3.1 Data collection

3.1.1 General

This EU level synthesis report is mainly based on data collected in the Spring of 2011 in 27 EU member states (by an expert on cooperatives in each of the member states). In addition, an inventory of policy measures at EU level was used. In collecting the data, multiple sources of information have been used, such as databases, interviews, corporate documents, academic and trade journal articles. The databases used are Amadeus, FADN, Eurostat and a database from DG Agri on the producer organisations in the fruit and vegetable sector. Also data provided by Copa-Cogeca have been used. In addition, information on individual cooperatives has been collected by studying annual reports, other corporate publications and websites. Interviews have been conducted with representatives of national associations of cooperatives, managers and board members of individual cooperatives, and academic or professional experts on cooperatives.

3.1.2 Legal Aspects

With regard to the data collection on the legal aspects, national experts were asked to make an inventory of policy measures and to reflect upon the legal aspects of policy measures in their country. The data collected here represent a *qualitative* assessment according to the national experts how policy measures promoted or impeded the creation and functioning of cooperatives from a legal point of view. These legal assessments are also found in section 5 of the national country reports.

Besides the legal assessment of policy measures by national experts, the study on legal aspects in the field of business organisational law, tax law and competition law required mapping of the relevant legislation – on national and EU-level – as well as an overview of the available literature. In this respect, this study was able to use and build on the information collected during the Study on the Implementation of the SCE-Statute. The 2010 SCE-Report contained for each member state a legal assessment of the national cooperative form and a legal assessment of the SCE in force in that specific member state. The 2010 SCE-Report has been made available to the national experts. The SCE-report, however, did not provide the necessary insight into the actual use and functioning of national cooperatives in each individual member state. In particular, this study on legal aspects of agricultural cooperatives required additional data and analysis of the actual driving forces that promoted or impeded the creation and/or functioning of cooperatives, at national level as well on the level the European Union, on a more empirical basis.

The assessment of the legal aspects mentioned above (business organisational law, tax law and competition law) were executed on the national level of the 27 member states, on the level of the European Union's regulation as well as on transnational aspects (potential impediments between member states caused by either national laws or regulation at EU-level). In particular, this study will address transnational cooperatives, defined as cooperatives having members in more than one member state, while a international cooperative is defined as a cooperative having sourcing activities with non-members in other member states, assessing whether members from other member states or non-members from other member states supplying cooperatives in another member state, encounter legal difficulties to exercise their membership or to become a member respectively.

In the first stage of the research of the legal aspects, the objective is to collect data on the existence of specific legal structures, regulations and specific rules that hamper or enhance the

establishment ex novo or the evolution of established agricultural producer organizations in practice. In order to collect the necessary empirical data, the national experts for each member state were asked to fill out a questionnaire on legal issues. The questionnaires used in the study can be found in the annex to this report.

3.1.3 Methodology: Legal Terminology and Defining Scope of the Research

Since the study intends to map and analyze the current position of agricultural producer organisations in all 27 member states, it is important from a methodological point of view to initially abstract from the legal business form in which agricultural producers are organised, to set up this part of the research and use a functional approach.

Agricultural producers generally are organised in the legal business form of a cooperative, sometimes in the legal business form of an association or, occasionally, in different legal business forms, like a limited partnership or even in a private company limited by shares. Furthermore, in practice agricultural producer organisations are organised as corporate groups, where the producer organisation is in full control or, in case of a joint venture, in joint control over its subsidiaries. Another type of organisational structure for cooperatives entails cooperation between cooperatives through the formation of a federation of cooperatives with primary cooperatives as its members. For the purpose of this research, these types of cooperative groups are included in the research under the condition that the agricultural producer organisation is in full or majority control, and therefore in the legal position to initiate, to determine and to impose the corporate strategy upon its subsidiaries.

Focusing the research only on the cooperative as a legal person would not include the whole range of interactions that together constitute the quintessential character of the cooperative enterprise. The use of group structures, joint ventures and federative structures raises questions with regard to the principle of democratic decision-making, one of the most characteristic features of the cooperative vis-à-vis investor-owned firms. In particular, the question whether members remain in the position to significantly influence the decision-making process and the overall strategy of the cooperative and its entrepreneurial subsidiaries (*effective* control as distinct from *formal* control).

Vice versa, it should be noted that not all organisations that are incorporated in the legal business form of a cooperative in practice operate – in the economic sense – as a cooperative as we define it.[23] For example, in the Netherland a very large number of cooperatives registered in the Commercial Register act as (sub)holding cooperatives in private equity structures for tax purposes. Therefore, it is important to make an inventory for each member state, which legal business forms are available for agricultural producer organisations and in which legal business form agricultural producers are generally organized and why? The next step is to make a legal assessment of the benefits and disadvantages of the legal business forms and to analyse under what legal conditions a certain legal business form for producer organisations suits the demands of agricultural producers best, balancing the benefits with the costs.

The second reason not to start the research from the legal business form but from the classifications used in this research and to use a *functional and thematic approach* of agricultural

[23] For the purpose of this research, agricultural producer organisations and cooperatives have the following characteristics according to the operational definition: an autonomous organisation, acting as firm (in most cases as a separate legal person), a member organisation, voluntary membership, members benefit through the use of the services provided by the organisation, members are the main users of these services, members control using a democratic decision-making structure, joint ownership of the organisation.

business organisations, is the fact that starting with the legal business form the assessment will most certainly create no uniform tool for comparative research, given the fact that there is a high degree of path dependency with regard to the historic evolution of legal business forms of cooperatives and associations in the EU (Galle 2007, Van der Sangen 2007[24] and the 2010 SCE-Report). Cooperatives are regulated as associations in some member states, as companies with share capital in others, albeit with variable share capital, and – occasionally – as contracts or not as a specific legal business form.

Therefore, the research will make an inventory of the possible and actual usage of legal business forms by agricultural producer organisations according to the typology of the research, assessing the economic effects of the three aspects of law (business organisational law, tax law and competition law). This functional and thematic approach will also preclude that the research will be hampered by language barriers and difficulties with regard to translating national codes and legal terminology. National experts will be asked, while answering on specific themes and items in the questionnaires, to describe the essential aspects of the legislation and to reference to it, where necessary, in English.

3.1.4 Data collecting

With regard to the available data on the legal business form of the cooperative (in the legal sense, not necessarily the economic and sociological sense), data are available through the 'Study on the implementation of the European Cooperative Statute', a study carried out by Euricse, CooperativesEurope and EKAI Center on behalf of the European Commission, DG Enterprise and Industry, which has been published in November 2010.[25] It contains not only data on the implementation of the European Cooperative Statute in all 27 member states, but also on the legal business form of the cooperative in an accurate way, providing very detailed information for the 27 member states on the legal (including tax) aspects for cooperatives, based on national experts' legal analysis and on interviews with legal scholars, board members of cooperatives and practitioners. The national experts and the interviewees that collaborated in the research projects, are listed in that document.

3.1.5 Inventory of policy measures and instrument from a legal point of view

In our research, the questionnaires for the national experts focus on identifying possible changes in the laws and the regulations with regard to agricultural producer organisations and cooperatives, in particular how these changes have an impact on the efficiency, positively or negatively, of producer organisations and cooperatives, along the line of the three legal aspects identified above (business organisational law aspects, taxation law aspects and competition law aspects). The inventory of the policy measures and instruments that promote or impede the efficiency of agricultural producer organisations from legal point entail:

- mapping relevant changes in regulations national or EU on the three legal aspects of business organisational law, tax law and competition law;

---

[24] G.J.H. van der Sangen, 'Grensoverschrijdende reorganisaties van coöperaties', in: Van der Sangen, G.J.H, Dortmond, P.J. & Galle, R.C.J. (2007), *De coöperatie. Een eigentijdse rechtsvorm*, Boom Juridische Uitgevers, Den Haag 2007, p. 65 en R.C.J. Galle, 'Societas Cooperativa Europea (SCE) en nationale coöperaties in vergelijkend perspectief', in; Van der Sangen, G.J.H, Dortmond, P.J. & Galle, R.C.J. (2007), *De coöperatie. Een eigentijdse rechtsvorm*, Boom Juridische Uitgevers, Den Haag 2007, p. 49-62. See also the 2004 EC Recommendation on the promotion of cooperatives and the SCE-Report 2010.

[25] http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/social-economy/

- mapping relevant literature with regard to legal tools for the promotion or impediment of agricultural producer organisations, where available;
- collecting data through national experts' answers on questionnaires on business organisational law, tax law and competition law aspects.

As indicated above, legal research – in particular with regard to cooperatives and producer organisations – has no tradition in assessing the effectiveness of the legal instruments and tools. Most legal scholars restrict themselves to a description and analysis of legal norms and structures of cooperative organizations. This is not to say that national legislators have evidenced an integrated approach towards the effectiveness of cooperative organisations as a tool to elevate agricultural producers. To be sure, article 78, paragraph 1, of the Council Regulation on the Statute for the European Cooperative Society states that member states shall make such provisions as is appropriate to ensure the effective application of the Regulation, however it does not impose on member states an obligation to introduce policy measures that positively promote the use of the European Cooperative Statute. Since there are no legal sources available on the effectiveness of legislation and/or policy measures related to the success or lack of success of cooperatives, the approach is to make a *qualitative assessment* of the legal structures, regulations and specific rules that hamper or enhance the success of agricultural producer organisations, based on the data collected of the actual use of the cooperative form in the member states.

In the questionnaires, a prioritisation has been made between the necessary questions national experts have to address and optional questions, indicated with "N" and "A". The "N" referred to the questions national experts were asked to answer, while the "A"-questions referred to data already available, but national experts were invited to reflect on voluntary basis. National experts were advised to refer to the legal data on cooperatives for their member state as reported in the DG Enterprise-report on the implementation of the SCE-Regulation.

3.2 Data analysis

On the basis of the data collected, a comparative overview has been made of the legal measures and tools which are considered to be an inducement or impediment for the economic growth and development of agricultural producer organisations assessing the main question how law in general and business organisational law, tax law and competition law in particular contribute (or not) to the ingredients for success of agricultural producer organisations. The analysis in particular will provide legal input on the drivers and constrains for the development of cooperatives with regard to the following objectives of this study:

- the fiscal incentives or disincentives at regional, national and/or EU-level,
- the legal aspects including those related to competition law, and
- the internal governance of agricultural producer organisations and cooperatives.

4. Results

4.1 Section 1. Business organisational law

With regard to the business organisational aspects, the basic research question is whether the legal structure in which agricultural producers are commonly organised, is effective and efficient vis-à-vis investor-owned firms (IOF). For this part of the study on legal aspects, data were collected and the legal requirements of cooperatives were analyzed with regard to the establishment of agricultural producer organisations – notably in the legal business form of a cooperative – and with regard to the internal governance, the membership and ownership structures, the financing of cooperative activities, exit-strategies and the facilities for domestic and cross-border reorganisations. In order the make the legal assessment, 10 hypotheses[26] were drawn-up which have been tested on the basis of the data available.

4.1.1 Hypothesis 1. The current legal regulation is hampering the formation of cooperatives

Available legal business forms

In the questionnaires, the national experts were asked to indicate which legal business forms are available in their member state for agricultural producers to organise themselves into POs. In 22 member states, no restrictions were found with regard to the available legal business form. Promoters could choose any kind of legal business form. In 5 member states, the menu of available legal business forms for POs was restricted: in Finland, to cooperatives and the limited liability company, in Ireland to the company limited by guarantee and the limited liability cooperative, in Lithuania to the cooperative and the association, in Luxembourg to the cooperative and the agricultural association, and in Portugal to the cooperative and the private company. Although in Spain no restrictions were reported, the menu of legal business forms for POs the regional laws have to be taken into account as well.

Although most respondents indicated that national legislation did not force the promoters of agricultural producers organisations to use the cooperative as a mandatory business form, the cooperative as a legal business form is commonly used in 17 member states. Apparently, in these members states the cooperative legal business form is the natural legal environment for agricultural producers to organise their joint business activities. This is a remarkable conclusion taking into account the outcome of the question whether the national law actively stimulated the use of a specific legal business form for POs. In 24 members states, no policy measures were reported that actively promoted the use of cooperatives, while in the other member states national experts reported indirect measures, in particular through tax facilities (Denmark) and the recognition by the government as a agricultural cooperative (Lithuania and Portugal).

There are, however, several member states in which the cooperative is not commonly used to organise agricultural producers. In Bulgaria en Rumania, the limited liability company was used to organise agricultural producers. A similar picture can be reported for Slovakia and Slovenia: the legal business form for POs commonly used are the cooperative and the LLC, however the cooperative in these member states are 'transformed' out of the former socialist cooperatives. The LLC is the dominant legal business form for new POs in Slovakia and Slovenia, because promoters and banks have a lack of trust in and willingness to do business with cooperatives. In Estonia, the LLC and the association are being used, as well as in some cases a cooperative. In

[26] The hypotheses were introduced in a narrative way on p. 9 and 10 of this study.

Latvia, the use of cooperatives is not widespread as well. In Luxembourg and Malta, the association was commonly used to organize agricultural producers, however these may account as cooperatives as well given the definition of a cooperative in this report. In Poland, 27% percent of the POs were cooperatives and 65% LLCs, while in Portugal 50% of the POs are cooperatives and 50% are private companies limited by shares.

With regard to the question which legal business forms could be used no reference was made by the national experts to the SCE as a viable option to organise agricultural producers. This supports the main finding of the 2010 SCE-Rapport that the SCE-Statute lacks awareness, although the SCE-Statute has been presented as an instrument to approximate the law of national cooperative statutes, as an efficient alternative for national cooperatives and as an instrument to facilitate cross-border cooperation between members and between cooperatives of or member states.

With regard to the question which legal business forms could be used no reference was made by the national experts to use a legal cooperative form from another member state on the basis of the freedom of establishment, including the freedom of cross-border legal merger, as laid down in the articles 49 and 54 TFEU. In this respect, any regulatory arbitrage is absent.

Formation costs

Agricultural producers who wish to set-up a cooperative do not encounter significant difficulties upon formation from a legal point of view. Although several members states include some restrictions in their national laws with regard to the establishment of the cooperative, these restrictions do not seem to hinder promoters in their efforts to establish a cooperative. In general, restrictions in this respect relate to the mandatory minimum number of members upon formation, ranging from a minimum of 2 members to 9 members, restrictions on the activity and the scope of the cooperative, which are – with the exception of France – laid down in general terms providing enough leeway for cooperatives to pursue their planned activities, and some restrictions on equity raising from non-members – which will be elaborated in more detail below. With regard to the funding of equity by members upon formation, the overall view is rather divided. Most members states do not require a minimum capital to be paid in, others set certain standards (Belgium a minimum of € 1550,- to be paid-in upon formation, Finland has no minimum capital but an obligation to create minimum reserve of € 2.500,-, in Portugal, agricultural cooperatives require a minimum capital upon formation of € 5.000,-, in Romania, a minimum capital of approximately € 500,-, in Slovakia a minimum capital of € 125,-). However, the capital requirements do not seem to constitute a significant restraint on the creation of new cooperatives. Assessing the average costs for setting up a cooperative (formation costs, registration costs and legal advice and drawing up necessary documents), the costs range between € 116,47 in Malta up to € 2800,- in Austria. However, the data did not take into account the costs of additional tailor-made drafting of the cooperative statute or any other additional legal, tax or organisational advice.

With regard to the costs for maintaining a cooperative, the respondents all referred to the usual costs companies incur for their having business records and a financial administration, the drawing up of annual accounts, tax formalities to be filed and the registration at the chamber of commerce or similar authority. The data and the reports of the national experts did not provide conclusive information that these costs would hinder the functioning of cooperatives. These costs are not viewed as too expensive. In Austria and Germany, cooperatives are obliged to become a member of the Cooperative Audit Federation incurring additional costs (Austria € 2800,- for the membership and in Germany, starting at € 1000,- and higher). Also in Cyprus, a fee has to be paid to the Commissioner of the Cooperative – a public oversight institution.

4.1.2 Hypothesis 2. The way cooperatives have to legally organise their internal governance is too cumbersome and hampering efficient decision-making

In this part of the study, the legal aspects related to the internal governance of cooperatives have been assessed. In particular, whether members remain in control over their cooperative.[27] Theory suggests that cooperatives in general as an organisational solution create inefficiencies in their internal governance and decision-making process, reflected in cumbersome procedures for corporate decision-making. Question is whether this assumption can be verified on the basis of the data of the questionnaires. It is a given fact that in most members states the cooperative is commonly used to organise agricultural producers. According to the evolutionary organizational theory of survivorship,[28] it would suggest that cooperatives vis-à-vis IOFs are viewed as significantly more efficient as the organisational model for POs. However, this is not the say that the internal governance of cooperatives could produce inefficiencies stemming form their legal environment, notably their formal attribution of control rights and their decision-making procedures according business organisational law.

However, assessing the legal structures of the internal governance of cooperatives, we cannot draw the conclusion that the way the national statutes regulating cooperatives dictate the structure of corporate bodies of cooperatives, their responsibilities and the level of accountability of the management board towards their members, produced – from a legal point of view – significant inefficiencies. On the contrary, on the question whether the overall corporate governance structure of the cooperative was considered to be flexible or cumbersome, for all member states the national experts reported that it is flexible, with the exception of Portugal, where the corporate governance structure was viewed as being rather petrified with mandatory provisions, having no facilities to include professional managers on the board except for the appointment of an executive officer under full responsibility of the management board and having no rules on a supervisory board, which according to the national experts leads to a lack of accountability towards the members, providing the members with too little information. In this respect, the internal governance in Bulgaria was considered to be too flexible, because of the strong position of the CEO leading to potential problems of moral hazard. Yet, no accountability gap has been reported. Although, the overall internal governance of German cooperatives was considered from a legal point of view flexible, reference was made to the fact that members in large cooperatives with diversified activities and acting as a corporate group may experience a lack of effective control. There were no data on this issue available for Ireland.

In several occasions, reference was made to the internal governance structure for small cooperatives: although the governance structures was not viewed as an impediment for the functioning of small cooperatives, questions were raised whether for small cooperatives a one-tier board would be more efficient, although not available, because the division of powers over a two-tier governance model was viewed too cumbersome, while others pointed out that for small cooperatives the appointment of professional managers or supervisory board members is too expensive (Hungary), given that all members are in the position to be involved in the bodies corporate of a small cooperative, as a result of which no accountability gap exists (Bulgaria, Cyprus). The argument presented here underscores the need for flexible statutes on cooperatives that are able to meet the demands of agricultural producers, relative to the evolutionary stage of their cooperative.

Several members states, like Denmark, Germany, The Netherlands and Sweden, have rules on the participation of employee representatives on the board. However, these rules on co-

[27] Introducing 'formal control' and the attribution of legal or contractual control rights versus 'effective control'. See H. Hansmann, *o.c.*, p. 11.
[28] See H. Hansmann, *o.c.*, p. 22.

determination do not seem to hinder the members of the cooperatives, since no reference was made to any problems in this respect by the national experts.

As indicated above, we also made an assessment whether the legal structure and rules on supervision of the management board was viewed as being effective with respect to the accountability of the management board towards members. A negative answer to this question indicated the existence to some extent of an accountability gap. In 22 member statutes, we found no evidence that the rules on internal governance lead to an accountability gap. However, as two national experts pointed out, the actual effectiveness of the internal governance as a technique for accountability towards members will largely depend on the quality of the members of the management board and the supervisory board. The existence of an accountability gap has been reported for Greece, Portugal, Spain and the United Kingdom. The situation for Portugal has been described in the previous paragraph. In Greece, there were no rules or mandates to have a supervisory board, while at the same time the law precluded professional managers as members of the management board, similar to the situation in Portugal. Although the overall internal governance for Spanish cooperatives was viewed flexible, several restrictions were reported. In Spain, there are no rules that mandate the installation of a supervisory board except for the officers called '*intervenors*', which cannot be considered to have a legal position that allow them to properly function as a supervisory board. Secondly, reference was made to the laws of autonomous regions that did not allow professional managers, while in general there was no guarantee that professional managers would be elected due to the procedure of secret voting by the general meeting. The level of accountability of the management board towards members in the United Kingdom was viewed as problematic, because there are no provisions in the Industrial and Provident Society Act that mandates the formation of a supervisory body.

In the study, we also made an assessment with regard to the question whether the composition of the management board was viewed flexible, in particular whether the national cooperative statute provided facilities to have professional managers on the board. In 19 member states, the management board may have one or more professional managers. In this respect, Estonia is exceptional because all the members of the management board and the supervisory board may be composed exclusively by non-members. Luxembourg mandates that only members can be elected as members of the management board of the agricultural association, contrary to the rules for cooperatives. In Bulgaria, Cyprus, the Czech Republic, Greece, Malta, Portugal and Slovakia, the members of the management board have to be members of the cooperative. With regard to the supervisory board, 16 members states provided the possibility to have non-members to be elected on the supervisory board in order to increase the level of knowledge and professionalism. 3 member states (Greece, Spain and the UK) did not mandate the creation of a supervisory board or an equal body corporate. 7 members states precluded non-members from being elected on the supervisory board (Bulgaria, Cyprus, the Czech Republic, Italy, Poland, Portugal and Slovakia). A remarkable finding in this respect is that the absence of the possibility to have professional managers on the board did not lead to an accountability gap in Bulgaria, Cyprus, the Czech Republic, Italy, Poland or Slovakia. We assume that most of these cooperatives are small and regionally operating, leaving members themselves in the position to actively monitor the management board. Further research has to be done to test this assumption.

4.1.3 Hypothesis 3. The legal structure restricts cooperatives in their economic need to be able to depart from the principles of open membership to gain control over the quality of its members and their inputs

Entrance of members

In order to assess this question, national experts were asked to reflect upon the question whether the national cooperative statute allows to depart from the principle of open membership and whether there are any legal restrictions in this respect. Open membership as well as voluntary membership is one of the most important principles of the I.C.A.. However, if open membership would involve a societal or legal norm to except any applicant, the principle could easily interfere with the economic need of the cooperative and its existing members for a restrictive admission policy of new members or even a closed policy. We tried to assess whether the law in itself precluded cooperatives from adhering to a restrictive admission policy. Except for the Czech Republic and Sweden, where the data ware inconclusive on the issue, all member states were reported to have no legal obstacles to introduce additional requirements upon entrance. Setting the standards for entrance falls within the competence of the general meeting through adjusting the bylaws of the cooperative. The data on Denmark, France, Hungary and Ireland seem to suggest that the principle of open membership is viewed as a legally enforceable norm in case the member meets the requirements of the membership. This is not to say that in all other member states cooperatives are legally entitled to a closed policy. This issue needs further research.

Differentiated voting rights

The quality of the supply of members is also correlated with the adjudication of voting rights proportional to the volume of the economic transactions an individual member has with the cooperative. It is also viewed as an instrument to prevent free-riding of small members on the contributions of larger members. However, the adjudication of voting rights proportionally may interfere with the principle of 'one man, one vote'. We tried to assess whether the law in itself precluded cooperatives from introducing techniques for adjudicating voting rights proportional to the volume of economic transactions. In this respect, the member states can be divided into three groups: the first group is formed by members states that do not allow to depart from the principle of 'one man, one vote'. In this group are: Bulgaria, Belgium for cooperatives, Cyprus, Estonia, Hungery, Ireland, Malta, Poland (for primary cooperatives), Portugal (for primary cooperatives), and Romania (for primary cooperatives). The second group is formed by members states that allow cooperatives to depart from the principle of 'one man, one vote', but only to a limited degree (showing a high degree of diversity between members states on the actual limits). In this group are: Austria, Belgium for accredited cooperatives, the Czech Republic, Denmark, Finland, Germany, Greece, Italy, Lithuania, Luxembourg (for agriculture associations). The third group is formed by members states where the adjudication of voting rights is rather liberal and can be attributed to members according to their volume of economic transactions with the cooperative. In this group are: Luxembourg (for cooperatives), The Netherlands, Spain, Sweden and the United Kingdom. However, in the case of Sweden departing from the principle of 'one share, one vote' will have a negative effect on the application of tax facilities for cooperatives. In the United Kingdom, the FSA has to agree on the amendments of the bylaws in this direction.

4.1.4 Hypothesis 4. Cooperatives have ineffective legal mechanisms to control the continuity of the input or purchase respectively by their members because cooperatives are presumed to have ineffective tools to prevent members from withdrawal

The efficiency of cooperatives is also effected by the unlimited withdrawal of members. On the other hand, cooperatives setting onerous restrictions on exit may distort competition as well as prevent potential members from joining the cooperative. Striking the right balance between efficiency for the cooperative and its members and fairness for the resigning member is not easy in this respect. In this part of the study, we wanted to assess whether business organisational law sets of rules in themselves would preclude that cooperatives are able to prevent the economic losses of unlimited withdrawal of members by setting restrictions on exit. In particular, we looked into the time restrictions and conditions for ending the membership (time-frame for giving notice). A significant number of member states adheres to a greater or lesser extend to the principle of voluntary membership, giving members unrestricted freedom of exit. These member states involve: Cyprus, the Czech Republic, Denmark, France, Italy, Latvia, Lithuania, and the United Kingdom. In the other member states, the law on cooperatives allowed to introduce restrictions on exit, however restricted to a maximum time-frame, ranging from maximum 3 months to 5 years, and even for Andalusia a maximum of 10 years. What is more important, is that all national experts reported that the restrictions were regarded to be reasonable and fair, indicating that setting restrictions on exit is not viewed problematic in general terms. However, on a individual basis the application of competition law may restrict cooperatives in their efforts to bond members for a certain period to the cooperative (see Hypothesis 10). We found no evidence on the basis of the answers to the questionnaires that the restrictions on exit in practice deter potential members from joining a cooperative, with the explicit exception of Ireland and Portugal.

4.1.5 Hypothesis 5. Cooperatives encounter different types of legal constraints with regard to doing business with members from other member states or in case business activities are organised in different member states

Transnational cooperatives

A transnational cooperatives has been defined in this report as a cooperative having members in two or more member states. The research question in this respect was whether the functioning of transnational cooperatives was hampered or not by regulation. More precisely, whether suppliers or purchasers from another member state encounter legal difficulties to become a member of a cooperative or to exercise their membership. With regard to the functioning of transnational cooperatives no evidence was found that national statutes on cooperatives contained legal restrictions on the acceptance of members from non-member states or on the exercise of their membership. As some of the national experts correctly pointed out, the entrance of suppliers or purchasers from other member states can be restricted effectively by the provisions in the bylaws of the cooperative, in which a restricted territory of the work field of the cooperative may be defined, as well as the pool of potential members related to this territory. As long as these provisions are applied in a non-discriminatory way, there would be no infringement of the freedom of movement of article 49 and 54 TFEU. Questionable is whether potential members from another member state can be barred from becoming a member, if the cooperative in the other member state is the only viable economic option.

One national expert pointed out that the SCE Statute provides the format for transnational cooperatives since the SCE requires members from two or more different member states, but he

also indicated that it is not cheap to form a transnational or international cooperative through an SCE. In the case of Malta, non-resident members from other member states need a permanent address in Malta. Another indirect restriction may be the eventuality that a member from another member state is submitted to a different set of tax regulation than the domestic members. However, this fact or any problems related to it, was not reported by the national experts, with the exception of the Arla case which is tax related. Hence, the legal environment for entrance of members from other members state does not seem to constitute a legal problem. Further research has to be done as to the effects of the existence of foreign members on the taxation of cooperative and its members. Yet, all respondents answered that to their knowledge there were no problems with taxation due to the existence of members from other member states in case of a transnational cooperative. However, two cases were reported: the tax problems between Swedish and Danish members of Arla and the differences in applicable rates of the French and German Value-added Tax regimes, because the German regime was more advantageous for members then the French regime. From the questionnaires, one could conclude that there are at the current moment no major tax issues with regard to transnational cooperatives.

No experience in this respect with one of the 17 SCEs has been reported. Art. 9 of the SCE Regulation stipulates that SCEs should be treated as cooperatives, formed in accordance with the law of the member state in which it has its registered office. However, this does not imply that in all member states the SCE will be treated as a cooperative with regard to taxation. This issue needs further investigation.

International cooperatives

International cooperatives in this report are defined as cooperative having sourcing activities with non-members in other member states. With the ambiguity of the data of Latvia, Malta and Portugal taken into account, cooperatives in all member states are free to set-up subsidiaries to operate as a corporate group. From a business organisational point of view, no restrictions in this respect were reported. With regard to the question whether cooperatives are restricted by law to organise their cooperative as a cooperative group with the cooperative as the parent company, member states do not impose any restrictions on cooperatives. However, setting up subsidiaries may have negative effects on the taxation of cooperatives and trigger a loss of tax facilities especially designed for cooperatives. For example, in the Netherlands using a subsidiary as the business unit for the economic transactions with the members will lead to a loss of the tax facility that was designed to prevent double taxation. Another example can be found in Sweden, were joint ownership of a subsidiary will lead to a loss of exemptions in the corporate income tax, or in case the subsidiary takes up diversified activities that are not related to the economic transactions with its members. Secondly, organising a cooperative as corporate group may result in practice in a decrease of effective control of members. However, this conclusion could not be deducted from the answers of the questionnaires nor the existence of poor decision-making processes and an increase of agency costs of delegated management.

Considering that the national laws of the member states do not restrict the use of subsidiaries directly, on the basis of the current strand of case law with respect to the freedom of movement, a cooperative may exercise the freedom of movement in using the legal business forms available in other member states. Combined with the absence of legal restrictions on memberships from other member states, from a business organisational point of view a cooperative could well properly function as a transnational and international cooperative without having to establish an SCE.

4.1.6 Hypothesis 6. Cooperatives are not able to distribute net proceeds taking into account the proportion of capital paid in by members

Techniques for raising equity from members have developed over time from unrestricted liability of members upon liquidation, to limited liability upon liquidation to unlimited liability. The historic evolution of financing cooperatives has shown very sophisticated techniques to finance the cooperative with equity from members, trying to tackle potential horizon-problems related to equity funding through unallocated reserves. The key question with regard to this issue is whether the law prevents tailor-made solutions in this respects. From the data provided in the questionnaires, the overall conclusion is that the national cooperative statutes do not restrict members to create tailor-made solutions in their bylaws. It is common practice that the distribution of profits to members as well as their obligations to participate in self-financing techniques of the cooperative are executed on the basis of the principle of proportionality, according to the volume of supply or purchase of an individual member with the cooperative. In this respect, it is worth mentioning that 22 member states were reported to have flexible legal rules on the distribution of profits to its members. The French rules on the distribution of profits were considered to be too restrictive, as well as in Portugal and Romania. The Luxembourg rules for the cooperative were considered too flexible, while the rules for the agricultural association as too restrictive. No data were available for the Czech Republic. However, retaining profits and accumulating reserves may have a considerable impact on the application of tax facilities.

4.1.7 Hypothesis 7. The legal structure of cooperatives prevents cooperatives from raising sufficient equity from outside investors

Raising equity by cooperatives by outside investors[29] in the EU is still in an embryonic stage. Based on the data from the questionnaires, there is no well established practice in the EU of raising equity from outside investors as equity suppliers. There are, however, two exceptions reported. In Denmark, Danish Crown is allowing private financing alongside the cooperative structure, as well as Arla since 2011. In Germany, there were 6 cooperative organisations reported with equity provided by outside investors (BayWa AG in Munich, a cooperative listed at the stock exchange, Handelsgenossenschaft Nord AG in Kiel, Raiffeisen Waren-Zentrale Rhein-Main eG in Cologne, Agravis Raiffeisen AG in Münster (Hannover), Raiffeisen-Warenzentrale Kurhessen-Thüringen GmbH in Kassel, and OLD Osterburg-Lüchow-Dannenberg eG). For Ireland, no cooperatives were reported in this respect. However, one should take into account that several agricultural cooperatives have been transformed into or participated in listed companies. In this respect, we would like to refer to the country report on Ireland.

The question is whether the virtual absence of raising equity from outside investors is to some extend caused by the lack of an adequate legal structure. On the basis of the assessment of the data from the questionnaires, we cannot draw this conclusion. On the question whether national law did or did not allow outside investors to participate in the equity capital of the cooperative, only 7 member states explicitly ruled out the participation of non-members in their national statute (Belgium, Bulgaria, Cyprus, Estonia, Portugal, Romania and Slovakia (since 1992). Consistently with this result, in these member states voting rights could not be adjudicated to outside investors according to their national statute on cooperatives. All other member states allowed or did not forbid the participation of outside investors in raising equity. However, there are several member states – although the participation of outside investors in raising equity did not encounter legal obstacles – where this possibility is not aligned with the adjudication of voting rights to outside investors (Finland, Greece, Hungary, Latvia, Lithuania, Malta, Poland,

[29] Outside investor in this respect are defined as non-members and as members who participate in the equity of the cooperative on a capital basis and unrelated to their transactions with the cooperative.

Slovenia, Sweden and the UK). As one national expert pointed out: without voting rights, there may be no willingness for outside investors to participate in the financing of the cooperative, while another national expert referred to the lack of clarity on the matter in the national cooperative law that prevents investments. Austria, Denmark, France, Germany, Italy, Luxembourg, The Netherlands and Spain provide the combination of the legal possibility of equity funding by outside investors together with the adjudication of voting rights to these investors. However, all these jurisdictions made provisions in their national law to restrict the number of votes to be casts by outside investors to prevent outvoting of the members. A preliminary conclusion in this respect would be that the legal business organisational environment is not a dissuasive factor that precludes cooperatives from raising equity from outside investors, with the exception of the first group of member states.[30]

One of the innovations of the SCE Statute is the facility to regulate the voting rights of outside investors, in particular in view of financing cooperatives with equity from outside investors.[31] However, the SCE Regulation leaves it to the member states and only to those member states that already provided this facility in their national law, to choose this option in their national SCE Statute. Until to date, this facility was not been used in practice.

4.1.8 Hypothesis 8. Cooperatives lack a proper legislative structure to reorganise their business, amongst others by way of legal mergers at a national or European level

Domestic legal mergers

With regard to domestic mergers, defined as mergers between two or more companies established in the same member state, the spectrum of member states can be divided into three groups. The first group of member states show a very flexible regime with regard to reorganising cooperatives, treating them on the same footing as IOFs, not barring mergers between cooperatives and IOFs and vice versa. This group is represented by Austria, Belgium, Germany, Hungary, Greece, Lithuania and Spain. Although the regime for reorganisations in the general law is flexible and regional laws follow the same principles, some differences do occur in Spain. In particular, there are insufficient provisions for mergers between cooperatives from different autonomous regions and these mergers are therefore rare.

The second group is represented by Cyprus, Denmark, Estonia, Finland, France, Italy, Latvia, Malta, The Netherlands, Slovenia, Sweden and the United Kingdom. The facilities for cooperatives to reorganise and merge are similar to the requirements for IOFs, providing efficient tools for mergers between cooperatives and between cooperatives and private companies limited by shares. Although some peculiarities exist: in the Netherlands, e.g. in principle cooperatives wishing to merge with private companies have to transform themselves prior to the merger into a private company or vice versa, while mergers with partnerships are not allowed through a legal merger at all.

The third group is represented by Bulgaria, Ireland, Luxembourg, Poland, Portugal, Romania and Slovakia setting strict restrictions on the facilities to merge. In general, these restrictions involve limiting the facilities for legal mergers to mergers between cooperatives only. No data with regard to the Czech Republic were available on this issue.

[30] See in this respect H. Hansmann, p. 141 as well as for the Netherlands – assessing the situation between 1990 and 1995, G.J.H. van der Sangen (1999), *o.c.*, summary. See also O.F. van Bekkum & J. Bijman (2006).
[31] See article 59, paragraph 3, limiting the total amount of voting rights of outside investors to 25%.

Set aside the latter group, the respondents were of the opinion that the national business organisational law regulations with regard to reorganisations of cooperatives provided effective tools. This is a remarkable conclusion taking into account that the member state were under no obligation to harmonise their national law on legal mergers with regard to cooperatives on the basis of the third EU Company Law Directive.[32] From the answers to the questionnaires follows that the efficiency of reorganisations in general are not effected by rules of employee involvement or taxation vis-à-vis IOFs.

Cross-border mergers

At the moment, the facilities available for cooperatives to enter into cross-border reorganisations are fragmented. The SCE-Regulation provides the facility for a cross-border legal merger between two or more cooperatives from different member states by establishing an SCE. However, to date, this facility has not been used by agricultural cooperatives. From a legal point view, there are several impediments that prevent the SCE Statute from being an effective tool for cross-border mergers between cooperatives. These include: the mandatory connection between the seat of incorporation and the real seat, the mandatory application of the procedure for employee involvement which is time-consuming and, if no agreement with the representatives of the employees in the Special Negotiation Body is reached, the mandatory application of the 'before and after'-principle restoring the highest level of co-determination on the cooperative after the merger, and the relatively high minimum capital requirement of € 30.000,-. Legal scholars have argued that cooperatives from different member states are also able to enter into a legal merger on the basis of the freedom of movement, like interpreted by the ECJ in the Sevic-case,[33] hopping on the bandwagon of the national legal merger rules of the member state of the acquiring cooperative. However, in this case a legal merger would imply the simultaneous application of national merger provisions, while no European rules are in force to coordinate this process, similar to the implemented 10th EU Company Law Directive on cross-border legal mergers between private companies limited by shares. In addition, the 10th Directive provides the possibility that national legislators – while implementing the 10th Directive – would allow cooperatives to merge with an SCE from another member state and vice versa, however still precluding cross-border mergers between cooperatives from different member states. In view of the demand for effective tools for cross-border mergers of cooperatives, future research should investigate whether relaxing the 10th Directive would be a viable option rather than forcing cooperatives to establish an SCE by way of a legal merger.

4.2. Section 2. Tax law

With regard to the tax aspect, the main research question is whether the taxation of producer organisations and its members – being either natural persons or legal persons – fosters or impedes economic growth of these organisations and their members. In particular, the question will be assessed whether agricultural producer organisations – notably cooperatives – are treated differently with regard to taxation at the level of the producer organisations and at the level of its members vis-à-vis their investor-owned competitors and their suppliers. Taking the primary function of cooperatives into account as an aggregate of economic independent patrons (Emelianoff 1942), a member state could apply pass-through taxation on the cooperative.

[32] Third EC Company Law Directive of 9 October 1978, concerning mergers of public limited liability companies (78/855/EEC), *OJ* 295/36 of 20 October 1978.
[33] ECJ 13 December 2005, C-411/03, Sevic Systems AG, *ECR* [2005] I-10805.

However, the evolution of cooperatives as wholly of partially independent enterprises has prompted legislators to tax cooperatives on the same footing as IOFs.

4.2.1 Hypothesis 9. Cooperatives have been granted too little leeway in tax law to circumvent the negative effects of the distribution of net proceeds

With regard to the question whether cooperatives have been granted to little leeway to circumvent the negative effects of the distribution of net proceeds, the study focused on the taxation of cooperatives and its members, in particular whether distribution would lead to double taxation in a manner that would be more burdensome than for IOFs. While making this assessment, it was necessary to refrain from a detailed analysis of the techniques of taxation on the level of the cooperative and its members, because the systems of taxation in the different member states differ substantially and need further analysis. However, on the basis of the data available the following general observations can be made.

The member states can be divided into 3 groups. The first group contains member states that effectively have prevented double taxation of the profits of the cooperative by exempting cooperatives from corporate income tax. This group includes Greece, Latvia, Malta and Portugal.

The second group is formed by member states that submit cooperatives to the same corporate income regime as IOFs, however providing several facilities for the deduction of patron dividends paid to the members related to the economic transactions between the cooperative and its members. In general, these techniques result in the possibility – under certain conditions – to deduct these patronage dividends from the taxable profits in the corporate income tax. This group includes Austria, Belgium, Cyprus, Denmark, France, Germany, Hungary, Luxembourg, The Netherlands, Sweden and the United Kingdom. However, commonly the facilities are restricted to profits generated from the patronage or economic transactions with the members. Other profits from non-related business activities are taken fully into account in the corporate income tax, with some thresholds of 10% not be taken into account (e.g. Austria and Germany). In other member states, like the Netherlands and the UK, the patronage dividends need to be paid out effectively to the members in order to enjoy the tax facility. Such a type of tax rule may prevent cooperatives and their members from forming equity through a general reserve and may have a negative impact on equity-raising from members.

Another question in this respect is whether it is justified that cooperatives are treated in tax law as a deformation or degeneration of the cooperative form,[34] excluding them from tax facilities designed for cooperatives, in case a cooperative uses the benefits of limited liability by using subsidiaries, as well as the corporate income tax facilities related to a division of the enterprise between a cooperative holding and a subsidiary. In the Netherlands, using subsidiaries will as a consequence lead to the loss of tax facilities. Future research should address this question in more detail whether a group structure applied by the cooperative has a negative impact on the burden of taxation of the cooperative and its members vis-à-vis IOFs, in particular when the economic function of the cooperative towards its members does not change.

In the third group, we find member states that do not have special tax facilities for cooperatives (Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Lithuania, Poland, Slovenia) or have tax facilities that have no impact on the promotion or success of cooperatives (Italy, Romania, Slovakia and Spain). In Finland, there has been reported an imbalance between the taxation of

[34] The terminology has been introduced by W.J.J. van Diepenbeek, De coöperatieve organisatie. De coöperatie als maatschappelijk en economisch verschijnsel, Delft: Eburon 1990, p. 126, with a summary in English.

interest paid to members of cooperatives vis-à-vis IOFs: cooperatives are granted tax free interest of € 1.500,-, while shareholders of IOFs were granted a tax free interest of € 90.000,-.

In the questionnaires, national experts were asked to reflect on the question whether the overall burden of taxation of the cooperative and its members was reasonable and fair in comparison to the taxation of IOFs. The results indicate that cooperatives from member states in the first two groups have sufficient fiscal leeway and are not hindered by tax restrictions. The taxation of cooperatives and its members vis-à-vis IOFs has been labelled as not being reasonable and fair in: Hungary, Italy, Lithuania, Poland, Rumania, Slovakia and Spain. In Hungary, Lithuania, Poland, Rumania and Slovakia, because there is no level playing field, while in Italy and Spain the tax facilities are insufficient given other costs incurred by the cooperative.

Some member states have special provisions that exempt cooperatives from Property Tax.

4.3. Section 3. Competition law

With regard to the competition law aspects, the main research question is to what extend producer organisations are treated differently than other market competitors. Here again, taking into account one of the primary functions of the cooperative – creating bargaining power towards monopolistic market participants – in principle the cooperative does not distort competition. However, in some member states agricultural producer organisations have become large and strong actors that according to the current national and EU competition legislation may be in the position to distort competition. Vice versa, the question may be raised whether competition law rules should be relaxed for small producer organisations, like the US Capper-Volstead Act (1922), or by means of generic exemptions in EU Regulations applicable on agricultural producer organisations for specific kinds of agricultural commodities.

From a competition point of view, producer organisations such as cooperatives may have positive as well as negative effects. An efficient market organisation helps to increase competitiveness in the relevant market as it may adapt production according to demand, lower production costs and facilitate introduction of eco-friendly production methods. In order to achieve these objectives, a cooperative may need to bind its members to exclusive sale rights and provide the members with information on yield, products or possible sale quantities. However, such power to concentrate agricultural production may lead to conflicts with competitions law as the aforementioned forms of cooperation are usually considered to be detrimental to effective competition. Such market organisations are, however, allowed in the agricultural sector, provided that certain conditions are fulfilled, which will be elaborated in more detail below.[35]

The main difference between agricultural provisions and competition law is that EU competition rules and national competition legislation apply simultaneously. Both national competition authorities and the European Commission may take actions in case of distortion of competition between companies. The institutions of European Union have exclusive competence in the field of Common Agriculture policy (hereinafter: CAP) and especially with common market organisations.

[35] See in this respect Gerbrandy, A. & Vries, S. de (2011), *Agricultural Policy and EU Competition Law. Possibilities and Limits for Self-Regulation in the Dairy Sector*, Eleven International Publishing: The Hague 2011, as well as the European Commission, DG Competition, *The interface between EU competition policy and the Common Agricultural Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector*, working paper, Brussels 16 February 2010, pp. 1-31 and the European Commission, DG Competition, *How EU Competition Policy Helps Dairy Farmers in Europe*, Questions & Answers, 16 February 2010.

4.3.1 Hypothesis 10. Cooperatives have been granted too little leeway in competition law in order to fulfil their economic objective as countervailing power or to gain economies of scale

Applicable competition law

Effective competition is an integral part of agricultural policy objectives and competition laws are part of the regulatory entity in agricultural sector. When assessing competition rules applicable in the agricultural sector, the legal framework consists of general EU competition provisions (i.e. articles 101 to 106 TFEU and all implementing provisions), EU competition rules specific to agricultural sector, and national competition legislation.

Article 42 TFEU Section 1 (previously article 36 EC) establishes that competition rules apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council, taking into account the objectives of Article 39 TFEU (previously article 33 EC). In accordance with article 42 TFEU, the Council has adopted two regulations currently in force which establish the relation between the rules of competition and CAP, i.e. Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural product (hereinafter: sCMO Regulation) and Regulation 1184/2006 (EC) applying certain rules of competition to the production of and trade in agricultural products (hereinafter: Regulation on rules of competition applicable on agricultural products). Both Regulations apply to agricultural products listed in Annex 1 of TFEU.

The sCMO Regulation applies to most important agricultural products and establishes a common organisation for these products, whereas Regulation on rules of competition applicable to agricultural products applies to such products which are covered in Annex 1 of TFEU, but do not fall within the scope of the sCMO Regulation. However, the competition provisions provided in both regulations are essentially the same. Article 175[36] sCMO Regulation states that articles 101 to 106 TFEU as well as all implementing provisions (for example merger control and enforcement rules) apply to the agricultural sector. Article 102 TFEU regarding prohibition of the abuse of a dominant position is fully applicable in the agricultural sector, although it is rarely applied due to the nature and structure of agricultural sector. If the conditions set out in article 176 sCMO Regulation[37] are fulfilled, the provisions of article 101 TFEU shall not be applied to agricultural market organizations. Obviously, these provisions only become relevant in case the general conditions of their applicability (such as effect on trade between Member States) are fulfilled. However, whether an agreement or practice is liable to affect trade between Member States will be determined case-specifically.

According to ECJ's established legal praxis, an agreement or practice "may affect" trade between member states if based on a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.[38] There must be "a sufficient degree of probability" that the agreement or practice "may affect" trade between member states, which implies that it is sufficient that the agreement or practice is "capable" of having such an effect. There is not any obligation or need to

[36] Identical to article 1 of Regulation on rules of competition applicable to agricultural products (1184/2006).

[37] Identical to article 2 of Regulation on rules of competition applicable to agricultural products (1184/2006).

[38] Commission Notice - Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty, para 23.

calculate the actual volume of trade between Member States affected by the agreement or practice and the assessment under the effect on trade criterion depends on a number of factors that individually may not be decisive.[39]

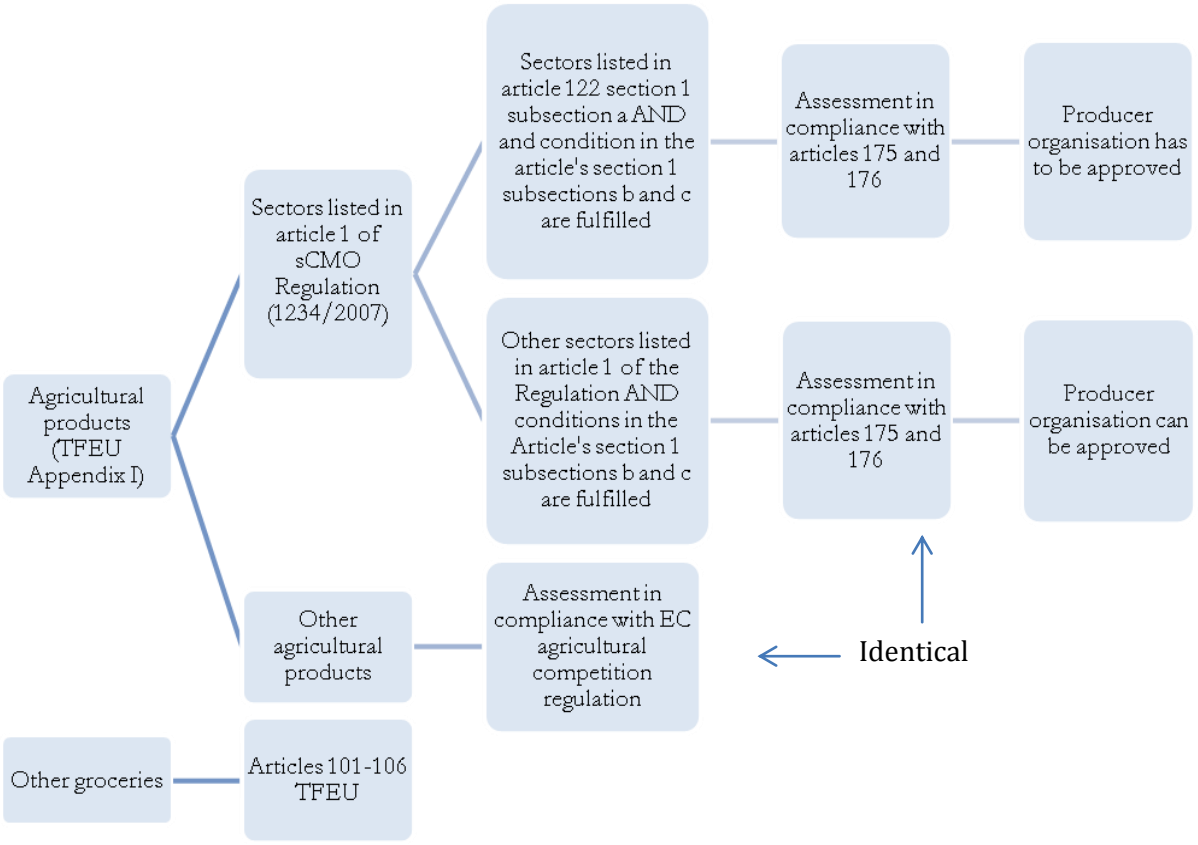
Even a single agreement or practice, which is confined to a single Member State and which does not directly relate to imports and exports, may still be capable of affecting trade between member states.[40] In qualitative terms, the assessment of agreements covering only part of a member state is approached in the same way as in the case of agreements covering the whole of a member state.[41]

Despite this casuistic analysis on the effect on trade, it is worth emphasizing that as most agricultural cooperatives are only regional, they may only very rarely be liable to have any effect on trade. It should be noted that although the competition rules do not apply unless the agreement or practice has effect on trade between member states, all member states currently have a rather efficient competition legislation that for most parts is equivalent to articles 101 and 102 TFEU.

Simultaneous application of CAP and competition rules

If conditions of article 122 section 1 of sCMO Regulation are fulfilled, member states must recognise producer organisations for the sectors listed in article 122 section 1 subsection a),[42] without any margin of discretion. However, if member states wish to recognise producer organisations in other sectors covered by sCMO Regulation, it is entirely to the member states discretion to do so, provided that the conditions of article 122 section 1 of sCMO Regulation are met.[43]

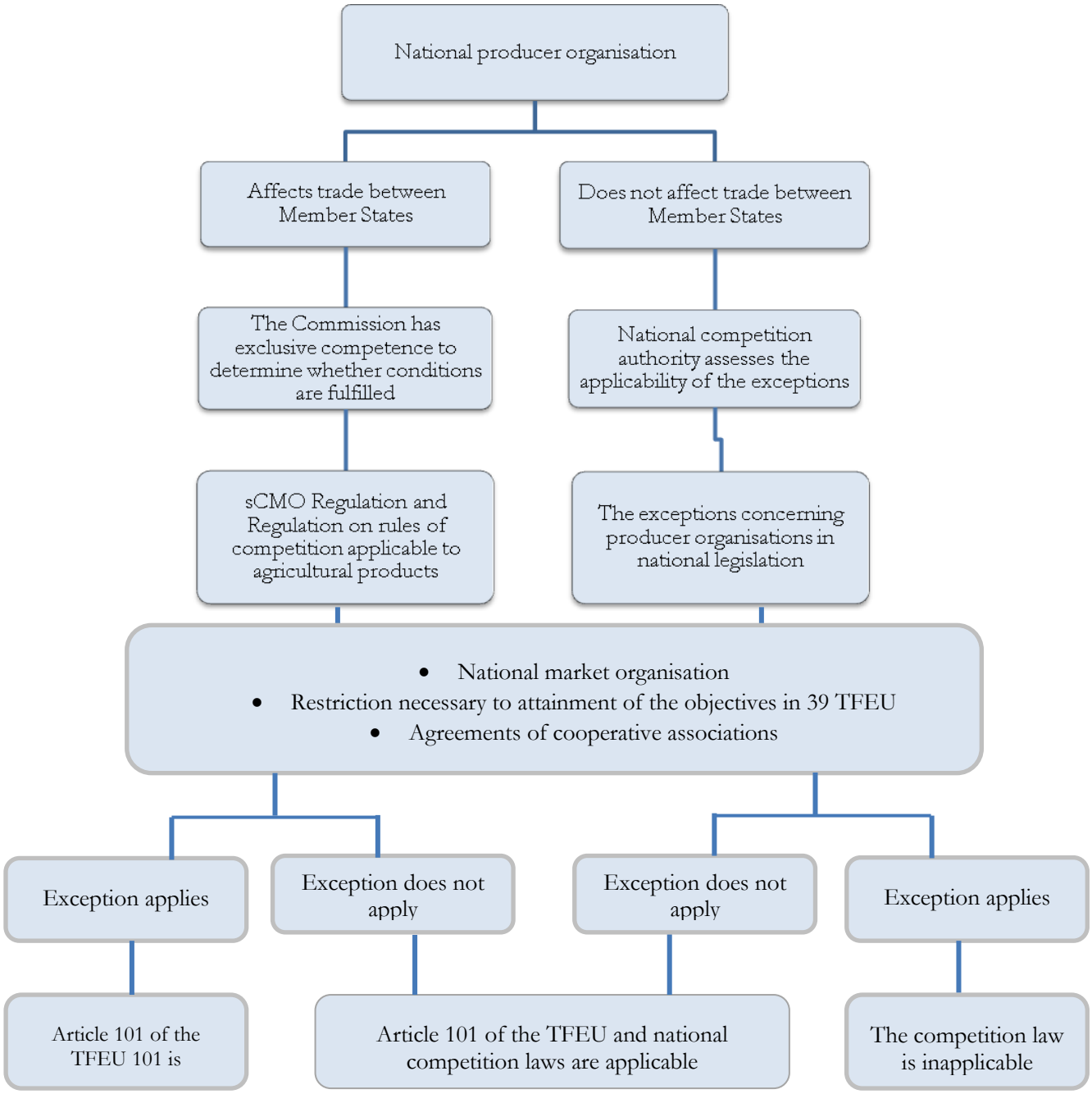
[39] Ibid., paras 26-28.
[40] Ibid., paras 83-84.
[41] Ibid., para 89.
[42] I.e. hops, olive oil and table olives, fruit and vegetables and silkworm.
[43] For further information, refer to the following case-law: Case IV/31.735 New potatoes, 18 December 1987, OJ 1988 L 59, p. 25, Joint cases T-70/92 and T-71/92 Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten v Commission, 14 May 1997, OJ 1997 C 199, p. 22, Case IV/35.28 Sicasov, 14 December 1998, OJ 1999 L 4, p. 27, Joint cases C-101/07 P and C-110/07 P Coop de France bétail et viande and Fédération nationale des syndicats d'exploitants agricoles v Commission, 18 December 2008, OJ 2009 C 44, p. 7, Case C-137/00 The Queen v The Competition Commission, formerly The Monopolies and Mergers Commission, and Others, ex parte Milk Marque Ltd and National Farmers' Union, 9 September 2003, OJ 2003 C 264, p. 2, Joint cases C-319/93, C-40/94 and C-224/94 Hendrik Evert Dijkstra v Friesland Coöperatie BA and Cornelis van Roessel etc. v De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA and Willem de Bie etc. v De Coöperatieve Zuivelcoöperatie Campina Melkunie BA, 12 December 1995, OJ 1996 C 46, p. 3, Case IV/31.204 Meldoc, 26 November 1986, OJ 1986 L 348, p. 50, Case IV/28.930 Milchförderungsfonds, 7 December 1984, OJ 1985 L 35, p. 35 and Case C-399/93 H. G. Oude Luttikhuis etc. v Verenigde Coöperatieve Melkindustrie Coberco BA, 12 December 1995, OJ 1996 C 46, p. 4.



In case a producer organisation does not affect trade between member states, national competition laws apply. National competition laws may not dilute uniform and effective application of CAP. According to article 176 sCMO Regulation, competition provisions do not apply to producer organisations recognised in accordance with article 122 sCMO Regulation.

In case of conflict between CAP provisions and national competition legislation, the provisions concerning CAP shall prevail according to the principle of primacy of EU law. When applying national competition laws, uniform application of CAP must be ensured.[44] National competition laws apply to agreements and practices subject to sCMO Regulation, as EU's general competition rules only apply if an agreement or practice has effect of trade between member states. sCMO Regulation is a part of CAP regardless weather it has effect on trade between member states.

[44] Case 83/78 Pigs Marketing Board v Raymond Redmond, 29 November 1978, ECR 1978 p. 2347, Case C-280/93 Germany v Council, 5 October 1994, ECR 1994 p. I-4973 and Case C-137/00 The Queen v The Competition Commission, formerly The Monopolies and Mergers Commission, and Others, ex parte Milk Marque Ltd and National Farmers' Union, 9 September 2003, OJ 2003 C 264, p. 2.


National producer organisation
Affects trade between Member States
Does not affect trade between Member States
The Commission has exclusive competence to determine whether conditions are fulfilled
National competition authority assesses the applicability of the exceptions
sCMO Regulation and Regulation on rules of competition applicable to agricultural products
The exceptions concerning producer organisations in national legislation
National market organisation
Restriction necessary to attainment of the objectives in 39 TFEU
Agreements of cooperative associations
Exception applies
Exception does not apply
Exception does not apply
Exception applies
Article 101 of the TFEU 101 is
Article 101 of the TFEU and national competition laws are applicable
The competition law is inapplicable

EC legislation has adopted the position that article 101 TFEU may apply to cooperatives and the contractual relations between its members. Competition restrictions the cooperative imposes on its members, such as the exclusive sales conditions and exit compensations, may exceed the threshold of what is considered to be necessary in order to secure the economic functioning of the cooperative. This applies similarly to cooperatives recognised according to sCMO Regulation.

Exempting cooperatives from scope of application of competition law does not seem justified. The cooperatives are formed by cooperation of independent traders. There is not any parent-subsidiary relationship, nor is there any agent relationship or employer-employee relationship. Members of cooperatives are also not financially integrated in such manner that the cooperative could be considered as a single economic entity.

The above-mentioned does not mean that the characteristics of cooperatives would not be taken into account when applying competition rules. Cooperatives must, however, be assessed based on actual objectives and effects of its arrangements. If, for example, restrictions upon withdrawal are necessary to the functions of the cooperative taking into account activities conducted, market conditions and fairness of the compensation, the restrictions may be in accordance with competition rules.

The overriding principle has been that restrictions upon withdrawal are not infringing if they are necessary for efficient economic functioning of the cooperative. Whether the restrictions are necessary has to be established on a case-to-case basis. In this respect, several determinants have been established in case law: the percentage of market share, the number of other market competitors, whether other market competitors use the same restrictions, whether the members are allowed to contract with other market competitors or exclusively with the cooperative, whether an accumulation of restrictions has the power to prevent members to contract with other market competitors.[45]

In summary, the specific characteristics of cooperatives, such as restrictions upon withdrawal, prohibition of dual membership, exclusive sales rights as well as common pricing may be taken into account. Therefore EU competition rules and national competition laws might not apply to a particular cooperative recognised according to article 122(1) of sCMO Regulation and if exceptions stated in article 176 of sCMO Regulation are met. If these conditions are not fulfilled, the exemption of article 101(3) TFEU may still apply.

Transnational cooperatives

The legal framework concerning transnational cooperatives is quite complex and different legislations have different attitudes towards them. The Regulation on European Cooperative Society (Council Regulation (EC) No 1435/2003) intents to contribute to the development of the cross-border activities of cooperative societies. The Regulation promotes the principle on non-discrimination according to which a European Cooperative Society shall be treated in every Member State as if it were a national cooperative. However, the impact of the SCE Statute on cross-border cooperation between and/or mergers of agricultural cooperatives – to date – is absent.

The Single CMO Regulation (Council Regulation (EC) No 1234/2007) has a rather neutral approach towards transnational cooperatives in general, as such organisations are accepted if they are formed on the initiative of the producers and they pursue aims, such as concentrating

[45] T. Ackermann, 'Joined Cases C-319-93, 40-94 & 224194, H.E. Dijkstra and Others v. Friesland (Frico Domo) Cooperatie', *Common market law review* (34) 1997, p. 695 and M.H. van der Woude, 'Coöperaties en mededingingsrecht', in: G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (eds.), *De coöperatie, een eigentijdse rechtsvorm,* Boom juridische uitgever: The Hague 2007, Chapter 8.

supply and marketing the product of the members, adapting production jointly to the requirements of the market and improving the product or promoting the rationalization and mechanization of production. Further, according to the Single CMO Regulation, producer organisations are exempted from application of article 101 TFEU, if they are necessary for the attainment of the objectives set out in article 39 TFEU. However, the so-called third exemption does not apply to transnational co-operatives, because they have members from several member states. This limitation of agricultural exemption thus discriminates transnational co-operatives compared to national co-operatives.

The Commission guidelines on the effect on trade are based on a *in casu*-analysis. Matters such as the aggregate market share of the parties (should not exceed 5 % on any relevant market within the Community affected by the agreement) and the aggregate annual Community turnover of the undertakings concerned (should not exceed € 40 million in the products covered by the agreement), the nature of the restrictions on competition and the effect on the pattern of trade between Member States may be taken into account in the assessment. Despite these rather high preconditions, the analysis must be based on the effect of each individual situation and therefore regional producer organisations may still have an effect on trade, for example if the agreement or practice relates to an intermediate product which is used in the supply of a final product, which is traded between member states. Thus a transnational organisation practically has effect on inter-state trade, in which case competition rules may prohibit such actions at EU-level. At national level, on the other hand, there may be national exemptions for producer cooperatives.

Therefore, there is no clear coherence in legislation concerning the legal status of transnational cooperatives in this respect.

Reports from member states with discussions on the application of competition law

General remarks

From the data in the questionnaires, currently attention has been paid to the application of competition law only in the Czech Republic, Denmark, Finland, Germany, Ireland, Luxembourg, The Netherlands, Poland and Sweden, and to some extend France and the United Kingdom. In the other member states, although EU and national competition law is applicable and no reference was made to exemptions especially designed for cooperatives – with the exception of Germany (see below) – cooperatives did not have any specific dealing with competition law because they are not in the economic position to distort competition (because market share is too low and/or members are entitled to withdraw from the cooperatives without significant restrictions).

In the following member states, one or more cooperatives are reported to have a dominant market share which has legal relevance for the application of EU or national competition law: the Czech Republic [MLECoop, with a market share of 30%], Denmark [Arla Foods]; the dominant position results in a legal obligation to except potential members because for them there is no viable alternative], Finland [the dairy and meat sector], Germany [dairy and cereal sector], Ireland [Plc Cooperatives on a national level], Luxembourg [Luxlait], The Netherlands [Friesland Campina], Poland [Mlekpol with 13% market share] and Sweden [Arla Foods]. In France, the national expert referred to several merger control cases and cases of price fixing by supply cooperatives. In the UK, there might be a nationally relevant dominant market of dairy cooperatives.

Spain

Subject to competition laws, both national and EU, the Spanish National Competition Commission, supports the creation of cooperatives through agreements amongst producers.

This is understood to mean that there are diverse forms in which agricultural producers can increase their negotiating power through associative agreement: for example, agreements in relation to joint production, joint warehousing or commercialisation. These agreements will be in accordance with the competition regulations when they comply with a series of requirements, in general related to the creation of economic efficiencies. On the contrary, such actions will be considered to be anti-competitive when they result in limitations to production, sharing out of markets and price-fixing.

Spanish cooperative legislation obliges the members of a cooperative to participate in the cooperative's activity to achieve its goals and social objects. The cooperative statutes and bylaws set out the obligatory minimum of such participation, including the possibility, typical of agricultural cooperatives, to impose the principle of *exclusivity* whereby all members are obligated to bring the whole of their production to the cooperative. This possibility is expressly set out in some autonomous cooperative laws (art. 77.2 LCCV and art. 152.4 LCAnd). In relation to this point, one could question whether the cooperative statutory and bylaws requirement of exclusivity, which does not exist under general law, could be considered to fall within the ambit of competition matters. This has never been considered to be the case in Spain, as it is understood that the principle of "open doors" in the functioning of cooperatives would address this concern. Exclusivity in agricultural cooperatives is very wide spread as it is usually imposed on members with the goal of obtaining the qualification of an Organisation of Agricultural Producers, which requires that such entities promise to reach minimum annual volumes. EC Regulations in this respect promotes such position of producer organisations without this being seen as a competition concern (see EC Council Regulation 2200/96, art. 11.3 (c)). A distinct question, and one of great interest for such entities and the agro alimentation sector, will be in function of future modifications of the EU community norms, in particular Regulation 1234/2007 of the OCM Single Payment, in relation to the reach of these norms to co-operatives/POs with respect to the representation of their members and the collective negotiation of their products.

Germany

Article 28 of the German Anti-Trust Law (Law against Restraints of Competition) contains an sectoral exemption for agricultural producer organisations but does not completely remove this sector from the reaches of the anti-trust legislation. Since then Art 28 is nearly equivalent to the European rules on competition (Art. 175-176 Reg. 1234/2007 and Reg. 1184/2006. Getting part of article 28 German Anti-Trust Law needs full-filling a few requirements e. g. members must be agricultural producers exclusively. The exemption from the prohibition of cartels is based on the structural difficulties and the specific disadvantages faced by agricultural producers. The exemption essentially serves to facilitate all self-help measures which tend to restrain competition in the agricultural sector. The exemption affects primarily production enterprises (agricultural farms) which undertake primary agricultural production. If these farm operations are organising their production, processing, and marketing through contracts and resolutions, their coordination activities are exempt from anti-trust laws. Most of these producer organisations are appearing in the legal form of cooperatives (*eingetragene Genossenschaft*, registered cooperative). With regard to question whether there are cooperatives with a dominant market share in the dairy sector, the national expert reports that no definite answer can be given at the moment, since the Anti-Trust Authority in Germany has started a discussion on that subject for the dairy sector.

Poland

Cooperatives and producers groups need to comply with the act of February 16th 2007 on competition and consumer protection. The act applies in case of mergers between cooperatives. The intention of a concentration has to be declared to the director of the Office of Competition and Consumer Protection, if the turnover of merging enterprises in the world market exceed 1

billion Euro and if the turnover in the Polish market exceeds 50 million euro. The director accepts a merger if it would not limit the competition. The reference the national experts made in this respect could indicate an increase of concentration in the Polish agricultural sector.

The United Kingdom

The national expert referred to exemptions of competition rules. The overall principles of the Competition Act 1998 apply but the particular circumstances of cooperation between farm businesses has been recognised. A note was produced by the Office of Fair Trading entitled: *Frequently asked questions: how does co-operation between farm businesses fit in with competition law* in July 2004 in order to clarify the situation in this particular sector.[46] Forms of agricultural collaboration can be excluded from the Competition Act where there are agreements between farmers or farmers' associations which 1)concern the production or sale of agricultural products, or 2) the use of joint facilities for the storage, treatment and processing of agricultural products. This is permissible as long as the agreements are only between farmers, or associations of farmers, and there is no obligation on the farmers to charge identical prices for their products. However these exclusions could be withdrawn by the OFT if it deems "that the co-operation is likely or intended substantially and unjustifiably to prevent, restrict or distort competition". There is also an exemption for certain forms of agricultural undertaking the supplier/buyer relationship provided that the agreement must not involve 'hard-core restrictions' (including price-fixing) and the parties must not have market shares exceeding 30% of the relevant market. This may cover some or all parts of an agreement.[47] With regard to possible dominant market shares, the national expert referred to the dairy sector. People involved in agricultural cooperation have a concern that the OFT might look at the national market to assess market dominance rather than stay at the European level. It is unclear if this would be the case. This lack of clarity suggests that hypothetical examples could and should be worked through before such situation, that would create problems, arises.

Conclusion

Cooperatives in agricultural sectors are very diverse by nature. If promotion and encouraging of producer organisations, namely cooperatives, is to be achieved efficiently, objectives of producer organisations must be defined precisely; otherwise there is a risk of conflict between national legislation and CAP provisions. Also specific rules on forms of cooperation that could by their nature or structure possibly be liable to affect trade between member states (for example, the national price arrangements, export taxes or funds, etc.) may be necessary. Territorial coverage and market position of cooperatives as well as the possible affects they might have on acceptability of cooperatives should also be defined as legislation which applies to producer organisations of all sizes (local, regional or national) may cause problems with EU law, if the effect on trade criterion is fulfilled.

Most importantly, national provisions on cooperatives and the EU competition rules must be coordinated. There are numerous cases, where cooperatives may have an effect on trade between member states. For example a market organisation concerning pricing arrangements of export or import or joint purchases from other member states, is by nature international. A nationwide market organisation will always be considered to affect trade between member states. Further, transnational cooperatives will most likely always have effect on trade between member states.

[46] http://www.oft.gov.uk/shared_oft/business_leaflets/competition_law/oft740.pdf.
[47] See FAQs in 9.1, previous footnote.

Legislation is problematic for legal certainty, if the cooperatives that are contrary to EU law may be accepted nationally. It would be justified, to assess which forms of cooperation are as such compatible with national competition laws.

If the aim is to promote producer organisations in the agricultural sector, it would be recommended to assess from the point of view of different types of cooperatives and different product markets whether general rules are enough or if specific provisions are required. For example, scope of activities, effects on competition and the content of the activities in relation to the objectives of article 39 TFEU must be taken into account when assessing possible effect on competition law.

5. Discussion

5.1. The importance of defining cooperatives

In this study, we started with defining cooperatives and concluded that there may be discrepancies between ideological, economic and legal definitions of cooperative organisations as a business form to organise agricultural producers. In the report, for methodological reasons a economic definition was used, going back to *Emelianoff*. The importance of defining the cooperative cannot be underestimated in respect of designing regulatory tools with inducements for cooperatives. In case of designing regulatory tools with inducements for cooperatives, the scope of the application has to be defined and restricted to (a certain group of) cooperatives in order to prevent abuse. In this respect, two major issues arise. Firstly, the freedom of association also includes the freedom to use foreign company forms on the basis of ECJ-case law. Attaching inducements to the legal form of a cooperative established in a specific member state may attract users from other member states. Barring them from the same inducements the cooperatives provide, may be considered an infringement of the freedom of movement.[48] Secondly, not only the freedom of movement has to be taken into account when introducing inducements specifically designed for cooperatives, also nationals not being agricultural producers as the promoters are entitled to the same treatment in case the inducements are available for legally established cooperatives.[49]

5.2. The importance of tailor-made cooperative statutes

While designing regulation specifically geared towards the promotion of efficient and smart legal tools for the creation and function of cooperatives, future proposals have to take into account the level of evolution of the cooperative movement (Hansmann 1996 and Van Bekkum 2009).[50] More 'sophisticated' cooperatives – large transnational and international cooperatives – encounter different legal problems and have different legal demands, which may have lead to an equal sophisticated legal environment. It is questionable whether small cooperatives – in particular – start-up cooperatives and regional cooperatives with restricted geographical modus operandi are helped by transplants of regulations from member states with a more developed legal environment. The foreseeable effects of using transplants or model statutes from the latter jurisdiction on transactions costs need to be properly assessed in advance. In this respect, we can learn from the experience of the regulatory process with regard to the SE Statute[51] as well as the SCE Statute. In this respect, the EC has stated in its recommendation on cooperatives that cooperatives themselves should design model codes although not providing legal assistance until this moment. From legal research on the regulatory competition between member states with regard to private companies and partnerships, the influence of interests groups on the

[48] See ECJ 9 March 1999, C-212/97 (Centros), [1999] *ECR* I-1495, ECJ 30 September 2003, C-167/01 (Inspire Art), [2003] *OJ* C 275/10, ECJ 5 November 2002, C-208/00 (Überseering), [2002] *ECR* I-9919 and ECJ 13 December 2005, C-411/03, (Sevic Systems AG), [2005] *ECR* I-10805ECJ-cases.

[49] See the current practice in the Netherlands where holding cooperatives are used as a tax planning tool for international private equity schemes, in particular because Dutch cooperatives are exempted form dividend withholding taxatation.

[50] See H. Hansmann, *o.c.* and O.F. van Bekkum, *Cooperative Champions or Investor Targets? The Challenges of Internationalization & External Capital*, Study commissioned by Landbrug & Fødervarer, Dec. 2009.

[51] Ernst & Young, Study on the operation and the impact of the Statute for a European Company (SE), Final Report 9 December 2009.

promulgation of legal innovations have to be taken into account as well, because it appears that interests groups may have weak or no incentives to actively promote legal innovations and law reform (McCahery & Vermeulen 2008).[52]

5.3. Cooperative regulation and ideology

It is questionable whether future regulation should mandate cooperatives to encapsulate ideological or societal norms in their bylaws.[53] Taking into account the historic evolution of agricultural cooperatives in 'sophisticated' member states, for example the Netherlands, the first agricultural cooperatives as well as the first cooperative banks could only prosper because of restrictions on the principle of open membership (Van Diepenbeek 1990)[54] and restrictions on the principle of freedom of exit. On the other hand, cooperatives principles embody societal and ideological norms that are relevant for the atmosphere in which members and their cooperative operate. We refer in this respect to the EU Synthesis Report of Gijselinckx & Bussels, *An EU wide analysis of social, cultural and historical influences on agricultural cooperatives* (2012).

5.4. Support measures and tax facilities' compatibility with EU state aid rules

Another aspect concerning support measures for agricultural POs and cooperatives that should be addressed, is whether financial inducements for agricultural Pos and cooperatives in the form of subsidies or tax facilities other than provisions to prevent double taxation for cooperatives in general, may constitute an infringement of the state aid rules as set out in the articles 107-109 TFEU (former articles 87-89 EC Treaty).[55] Agricultural POs and cooperatives are not generically exempted from these rules.

The general rules for state aid can be summarized as follows. A support measures constitutes forbidden state aid if the following criteria are met cumulatively: 1) the support measure is taken by the state or financed by state resources, 2) the support measure (potentially) affects trade between member states and distorts competition, 3) the support measure leads to an advantage, 4) the advantage only benefits a specific group of enterprises or production ('selectivity'), and, finally, 5) the support measure does not fall within the scope of any exemption provided for on the basis of the Treaty (generic exemptions as mentioned in article 107, paragraph 2 TFEU, and specific exemptions as listed in article 107, paragraph 3 TFEU and to be decided upon by the European Commission). The latter includes the *de-minimis* rule: any support measure that does not exceed the total amount of € 200.000,- in a timeframe of three years, is not considered to affect competition and constitutes, therefore, no forbidden state aid.[56] However, there are also some exemptions specifically for agricultural producers.[57]

---

[52] J.A. McCahery & E.P.M. Vermeulen, *The Corporate Governance of Non-Listed Firms*, Oxford University Press 2008, passim.

[53] H. Hansmann, *o.c.* p. 7.

[54] W.J.J. van Diepenbeek, *De coöperatieve organisatie. De coöperatie als maatschappelijk en economisch verschijnsel*, Delft: Eburon 1990.

[55] S. Stevens, 'Tax Aid and Non-profit Organizations', *EC Tax Review* 2010-4, Kluwer Law International, p. 156-169 M. Sánchez Rydelski, 'Distinction between State Aid and General Tax Measures', *EC Tax Review* 2010-4, p. 149-155, Kluwer Law International.

[56] See Commission Regulation (EC), No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

[57] See http://ec.europa.eu/agriculture/stateaid/leg/index_en.htm#specific.

On the basis of the data available in the country reports and in the answers to questionnaires on legal aspects, we were able to detect some support measures specifically designed for agricultural POs and cooperatives, amongst which several tax facilities in various countries, that on first sight might fall within the scope of state aid regulation. For example, Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Rumania, Spain and the UK – 15 out of 27 member states – provide specific exemptions from taxation rules specifically designed for agricultural POs or agricultural cooperatives, varying from exemptions of certain aspects of Corporate Income Tax to Property Tax or Real Estate Tax. Also, in some cases support measures in the form of subsidies for transport costs (Bulgaria and Spain) were reported. However, we were not able to make an assessment whether the support measures provided by the national or regional authorities actually entailed an infringement of the current EU state aid rules. This kind of assessment needs a case-to-case analysis, which analysis was not part of this study.

Although agricultural producer organizations and cooperatives are not generically exempted from the application article 107 TFEU, it is not to say that the specificity of agricultural POs and cooperatives is irrelevant, for the economic role and function of agricultural POs and cooperatives are acknowledged by the European Commission as well as the European Court of Justice. In this respect, we refer for example to the 15 December 2009 decision of the European Commission vs. Spain (C 22/01).[58] The Commission acknowledged in its decision that agricultural cooperatives fulfil the objectives referred to in Article 39 TFEU and that they therefore facilitate the development of agricultural activity. Moreover, as agriculture is a sector closely linked to the economy as a whole, it must also be concluded that agricultural cooperatives facilitate the development of the economic regions where they are located. The Commission also pointed out that this decision – establishing in this case forbidden state-aid – concerns only the measures of the case at hand.

Another positive sign with regard to the position of agricultural POs and cooperatives is the recent judgment of 8 September 2011 of the European Court of Justice in the joined cases C-78/08 to C-80/08.[59] This case specifically addressed the issue of *selectivity*, in particular with regard to tax measures, which have to be compared with a member state's normal tax regime in order to determine whether the tax measure discriminates between economic operators who are actually in a comparable factual and legal situation given the objective of the national tax system. In this case, the use of net profit to assess corporation tax applied to cooperatives and to other firms, but the cooperatives had the benefit of exemptions not available to other firms because of their legal form. The legal issue to be decided by the court was whether the cooperatives were in a comparable factual and legal situation to the other firms.

The ECJ ruled that in principle the cooperatives in these cases were not in a comparable situation and so the tax exemptions could be justified. This was because in these cases, they operated for the mutual benefit of their members who are users, suppliers, or employees who benefit in proportion to their transactions with the cooperative, being worker cooperatives. In addition, the cooperatives' limited access to equity markets and the limited return offered on share and loan capital make it harder for them to raise capital. The lower profit margin that flows from those characteristics makes their position not comparable with that of commercial companies. However, societies which do not truly pursue an objective based on mutuality in accordance with the EU Commission Recommendation on the promotion of cooperative societies in Europe of 23 February 2004, COM (2004) 18 final, would be treated differently and might be

[58] Commission Decision of 15 December 2009 on support measures implemented by Spain in the agricultural sector following the increase in fuel prices, *OJ* L 235/1 of 24 June 2010.
[59] See Joined Cases C-78/08 to C0-80/08 *Ministero dell'Economia e della Finanze v Paint Graphos Sarl*, decided on the basis of the former article 87 EC Treaty.

regarded as being comparable to commercial companies so that any tax benefit could amount to a state aid. The EJC also explicitly referred to the recitals 8 an 10 of the preamble of the SCE-Regulation and the cooperative principles enunciated in those recitals.

The implication of this line of reasoning would be that a tax regime that favours cooperatives vis-à-vis IOFs need not necessarily constitute state aid as long as the members of the cooperative legally and factually act according to the cooperative principle of mutuality. Cooperatives adhering to these principles same to be granted a save haven in respect of the application of state aid rules. However, future research needs to be done to establish under which precise conditions tax facilities for cooperatives do not fall within the scope of state aid. In particular, the interpretation of the concept 'mutuality' and its precise boundaries needs further clarification.

6. Conclusions

Hypothesis 1. The current legal regulation is hampering the formation of cooperatives

Although there is no evidence that member states actively promote the formation of cooperatives to organize agricultural producers nor mandate that they should use the cooperative as the legal business form, the cooperative is commonly used in the EU and appears to be the natural legal environment for agricultural producers to organise their joint business activities. However, the promotion of cooperatives is indirectly supported by tax facilities in several member states. The cooperative is not commonly used in Bulgaria, Estonia, Latvia, Poland, Rumania, Slovakia and Slovenia. The limited liability company is the dominant legal entity in which agricultural producers are organised in these member states. In Portugal, the division is 50/50. The SCE is not used in the agricultural sector, nor did the national experts refer to it as one of the available legal business forms. The costs for setting-up a cooperative as well as for maintaining a cooperative are not hampering the formation of cooperatives.

Hypothesis 2. The way cooperatives have to legally organise their internal governance is too cumbersome and hampering efficient decision-making

Assessing the legal structures of the internal governance of cooperatives, the data did not support the hypothesis. On the contrary, expect for Portugal, the overall internal governance structures are viewed from a legal point of view flexible. In large cooperatives, in particular internationally operating cooperatives with diversified activities, there may some concern about the perceived loss of effective control by members. Questions were also raised with regard to the internal governance for small cooperatives, indicating that efficiency could be gained in sizing down the mandatory cooperative bodies. In 22 member state, members did not feel an accountability gap. The accountability of the management board to members was viewed problematic in Greece, Portugal, Spain and the UK and was related the lack of legal mandates to form a supervisory board or an equal institution. The efficiency of cooperatives as well as the monitoring of the management board could be increased through professional managers on the management board and / or on the supervisory board. In Bulgaria, Cyprus, the Czech Republic, Greece, Malta, Portugal and Slovakia, the members of the management board have to be members of the cooperative. 16 member states provided the possibility to have non-members to be elected on the management board. In 7 member states, members of the supervisory board needed to be members of the cooperative. However, it does not necessarily mean that there is an accountability gap. We assume because in these member states the cooperatives are small and regionally operating, leaving members themselves in the position to actively monitor the management board.

Hypothesis 3. The legal structure restricts cooperatives in their economic need to be able to depart from the principle of open membership

With regard to the question whether cooperatives are legally allowed to follow a restrictive admission policy towards applicants for membership, the overall majority of member states did not have legal obstacles to introduce additional requirements upon entrance by setting standard in the bylaws of the cooperative. Of course, certain standards may be onerous or result in an infringement of competition law, but the freedom to follow a restrictive admission policy was well established in most member states from a business organisational point of view. The data on Denmark, France, Hungary and Ireland seem to suggest that the principle of open membership is legally enforceable. For Denmark, reference was made to that fact that a cooperative may have an obligation to accept new applicants, because of the dominant position of the cooperative.

Directly related to the question of open membership, is the question whether all members are entitled to have voting rights according to the principle of 'one man, one vote' and whether the cooperative and its existing members are free to depart from it by introducing voting rights proportional to the volume of economic transactions of the individual member. In 10 member states, the principle of 'one man, one vote' was the mandatory rule. In 11 member states, cooperatives ware allowed to depart from it, however with a limit on the number of multiple votes, while a minority of member states allowed departing from the principle without any limits set by law on the number of multiple voting rights.

Hypothesis 4. Cooperatives have ineffective legal mechanisms to control the continuity of the input or purchase respectively by their members because cooperatives are presumed to have ineffective tools to prevent members from withdrawal

The hypothesis was found to be true for a significant number of member states that adhere to the principle of voluntary membership giving the members unrestricted freedom to exit the cooperative (Cyprus, the Czech Republic, Denmark, France, Italy, Latvia, Lithuania and the United Kingdom). In the other member states, cooperatives were allowed to introduce restrictions, showing a large variety of modes in the time-frame. Two important findings are: 1) in all members states the restrictions on exit were viewed as reasonable and fair, indicating that setting restrictions on exit is not considered problematic, and 2) the existence of restrictions on exit did not preclude potential members from joining a cooperative.

Hypothesis 5. Cooperatives encounter different types of legal constraints with regard to doing business with members from other member states or in case business activities are organised in different member states.

No evidence was found that national cooperative statutes contained legal restrictions on the acceptance of members from other member states or on the exercise of their membership. Taking into to account the established case law of the ECJ on the freedom of movement, cooperatives encounter no restrictions in setting-up subsidiaries in other member states. The SCE Statute is not used until now by agricultural producers to form a transnational or international cooperative. Questionable is whether potential members from another member state can be barred from becoming a member, if the cooperative in the other member state is the only viable economic option to join a cooperative. The taxation of members from other member states did not lead to significant problems so far, with the exception of the two cases reported in Sweden/Denmark and France/Germany.

With regard to the question whether cooperatives are restricted by law to organise the cooperative as a group with the cooperative as the parent company, member states do not impose any restrictions on cooperatives in this respect. Yet, setting-up subsidiaries may have a negative impact on the taxation of cooperatives and in several member states triggers a loss of tax facilities especially designed for cooperatives and their members to prevent double taxation. This tax aspect and also the question whether cooperative groups result in a loss of effective control needs further investigation.

Hypothesis 6. Cooperatives are not able to distribute net proceeds taking into account the proportion of capital paid in by members

The key question with regard to this issue was whether the law prevented tailor-made solutions in this respects. The overall conclusion is that cooperative statutes do not restrict members to create tailor-made solutions in their bylaws. It is common practice that the distribution of profits to members as well as their obligations to participate in self-financing techniques of the cooperative is executed on the basis of the principle of proportionality, according to the volume of supply or purchase of an individual member with the cooperative. In this respect, it is worth mentioning that 22 member states were reported to have flexible legal rules on the distribution

of profits to its members. However, retaining profits and accumulating reserves may trigger a loss of tax facilities.

Hypothesis 7. The legal structure of cooperatives prevents cooperatives from raising sufficient equity from outside investors

The virtual absence of raising equity from outside investors is not caused by the lack of an adequate legal structure. Only 7 member states (Belgium, Bulgaria, Cyprus, Estonia, Portugal, Romania and Slovakia) did not allow outside investors to participate in the equity capital of the cooperative. Accordingly, in these member states voting rights could not be adjudicated to non-using members. However, it remains questionable whether in these member states there is a genuine demand for this legal facility. The other member states allowed or did not forbid outside investors to participate in raising equity. However, in a substantial number of these member states this facility was not aligned with the adjudication of voting rights to outside investors (Finland, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Sweden and the UK). But, even in the member state with both facilities, raising equity from outside investors is still in an embryonic stadium. Hence, the conclusion that the legal structure of cooperative is not a dissuasive factor in this respect.

Hypothesis 8. Cooperatives lack a proper legislative structure to reorganise their business, amongst others by way of legal mergers at a national or European level

With regard to domestic merger facilities, the overall view is that all member states do have facilities for cooperatives to merge with other cooperatives. With regard to the question whether cooperatives have efficient facilities to merge with other legal business forms, Bulgaria, Ireland, Luxembourg, Poland, Portugal, Rumania and Slovakia precluded this option. On the other side, Austria, Belgium, Germany, Hungary, Greece, Lithuania and Spain provide a highly flexible set of rules on domestic mergers. The largest group of member states provides for rules on domestic mergers between cooperatives and with private companies, although with several highly path-dependent restrictions. In this respect, the situation in Spain is interesting because there are some impediments for cooperatives from different autonomous regions to merge with cooperatives of another region. In general, the efficiency of reorganisations is not negatively effected by rules of employee involvement or taxation vis-à-vis IOFs.

The facilities for cross-border mergers between cooperatives remain fragmented. The SCE Regulation provides the necessary facilities for cross-border mergers, but the SCE is not used in practice by agricultural cooperatives. The 10th Directive on cross-border legal mergers of private companies did not have a significant harmonising effect on the facilities for cooperatives to engage in a cross-border merger. Although the right to participate in a cross-border legal between cooperatives from different member states can be based on ECJ case law, notably the Sevic System AG-case, this possibility lacks legal certainty. Future research should address the question whether relaxing the 10th Directive would be a viable option to facilitate cross-border mergers of cooperatives.

Hypothesis 9. Cooperatives have been granted too little leeway in tax law to circumvent the negative effects of the distribution of net proceeds

With regard to the question whether tax law prevented double taxation in a manner that would be more burdensome than for IOFs, the results can be divided into 3 groups of member states. Greece, Latvia, Malta and Portugal effectively exempted cooperatives from the application of corporate income tax. On the other side of the spectrum, there are 8 member states (Bulgaria, the Czech Republic, Estonia, Finland, Ireland, Lithuania, Poland and Slovenia) with no special tax facilities for cooperatives, and 4 member states (Italy, Romania, Slovakia and Spain) with tax facilities that did not have a significant impact on the promotion or success of the cooperative. The taxation of cooperatives and their members vis-à-vis IOFs has been labelled as not being reasonable and fair in: Hungary, Italy, Lithuania, Poland, Rumania, Slovakia and Spain. In

Hungary, Lithuania, Poland, Rumania and Slovakia, because there is no level playing field, while in Italy and Spain the tax facilities are insufficient given other costs incurred by the cooperative.

Hypothesis 10. Cooperatives have been granted too little leeway in competition law in order to fulfil their economic objective as countervailing power or to gain economies of scale

Although cooperatives in all member states are submitted to rules of national and European competition law, competition law only appears to relevant for cooperatives from the Czech Republic, Denmark, Finland, Germany, Ireland, Luxembourg, The Netherlands, Poland and Sweden, and to some extend France and the United Kingdom. In the other members state, the cooperatives' market share is too low or members were entitled to withdraw without significant restrictions. For the first group of members states, in § 4.10 reference was made to a dominant market position of one or more cooperatives. This overview underscores that cooperatives in agricultural sectors are very diverse by nature.

If promotion and encouraging of producer organisations, namely cooperatives, is to be achieved efficiently, objectives of producer organisations must be defined precisely; otherwise there is a risk of conflict between national legislation and CAP provisions. Also specific rules on forms of cooperation that could by their nature or structure possibly be liable to affect trade between member states (for example, the national price arrangements, export taxes or funds, etc.) may be necessary. Territorial coverage and market position of cooperatives as well as the possible affects they might have on acceptability of cooperatives should also be defined as legislation which applies to producer organisations of all sizes (local, regional or national) may cause problems with EU law, if the effect on trade criterion is fulfilled.

Most importantly, national provisions on cooperatives and the EU competition rules must be coordinated. There are numerous cases, where cooperatives may have an effect on trade between member states. For example a market organisation concerning pricing arrangements of export or import or joint purchases from other member states, is by nature international. A nationwide market organisation will always be considered to affect trade between member states. Further, transnational cooperatives will most likely always have effect on trade between member states.

Legislation is problematic for legal certainty, if the cooperatives that are contrary to EU law may be accepted nationally. It would be justified, to assess which forms of cooperation are as such compatible with national competition laws.

If the aim is to promote producer organisations in the agricultural sector, it would be recommended to assess from the point of view of different types of cooperatives and different product markets whether general rules are enough or if specific provisions are required. For example, scope of activities, effects on competition and the content of the activities in relation to the objectives of article 39 TFEU must be taken into account when assessing possible effect on competition law.

REFERENCES

T. Ackermann, 'Joined Cases C-319-93, 40-94 & 224194, H.E. Dijkstra and Others v. Friesland (Frico Domo) Cooperatie', Common market law review (34) 1997, p. 695-771

O.F. van Bekkum, Cooperative Champions or Investor Targets? The Challenges of Internationalization & External Capital, Study commissioned by Landbrug & Fødervarer, December 2009

O.F. van Bekkum & J. Bijman, Innovations in Cooperative Ownership: Converted and Hybrid Listed Cooperatives, Business paper presented at the 7th International Conference on Management in AgriFood Chains and Networks, Ede, The Netherlands, 31 May – 2 June, 2006

Cogeca, Agricultural cooperatives in Europe. Main issues and trends, Brussels, 16 September 2010, p. 1-175

W.J.J. van Diepenbeek, De coöperatieve organisatie. De coöperatie als maatschappelijk en economisch verschijnsel, Delft: Eburon 1990

Emelianoff, I.V. (1942), Economic Theory of Co-operation, Washington 1942

Ernst & Young, Study on the operation and the impact of the Statute for a European Company (SE), Final Report, 9 December 2009

P.H.J. Essers, E.C.C.M. Kemmeren, M.J.G.C. Raaijmakers & G.J.H. van der Sangen, Reforming the Law on Business Organizations, Eleven International Publishing: The Hague 2011

European Commission, DG Competition, The interface between EU competition policy and the Common Agricultural Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector, working paper, Brussels 16 February 2010, pp. 1-31

European Commission, DG Competition, How EU Competition Policy Helps Dairy Farmers in Europe, Questions & Answers, 16 February 2010

R.C.J. Galle, 'Societas Cooperativa Europea (SCE) en nationale coöperaties in vergelijkend perspectief', in; Van der Sangen, G.J.H, Dortmond, P.J. & Galle, R.C.J. (2007), De coöperatie. Een eigentijdse rechtsvorm, Boom Juridische Uitgevers, Den Haag 2007, p. 49-62

M. Gelter, 'Tilting the Balance between Capital and Labor? The effects of Regulatory Arbitrage in European Corporate Law on Employees', Fordham International Law Journal, Vol. 33, No. 3, 2009

Gerbrandy, A. & Vries, S. de (2011), Agricultural Policy and EU Competition Law. Possibilities and Limits for Self-Regulation in the Dairy Sector, Eleven International Publishing: The Hague 2011

H. Hansmann, The ownership of enterprise, The Belknap Press, Harvard University Press, Cambridge, Massachusetts / London, England, 1996

Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework For Company Law in Europe (Winter Report), 4 November 2002

P. Kalmi, The Disappearance of Co-operatives from Economic Textbooks, Helsinki School of Economics Working Papers W-398, February 2006

R. Kraakman e.a. (Eds.), The Anatomy of Corporate law, A Comparative and Functional Approach, second edition, New York: Oxford University Press 2009

S. Levmore, 'Uncorporations and the Delaware Strategy', in: J.A. McCahery et.al. (eds.), Private Company Law Reform, International and European Perspectives, T.M.C. Asser Press: The Hague 2010

J.A. McCahery & E.P.M. Vermeulen, The Corporate Governance of Non-Listed Firms, Oxford University Press 2008

M.J. Roe, 'Delaware's Competition?', 117 Harvard Law Review (2003), p. 588

M. Sánchez Rydelski, 'Distinction between State Aid and General Tax Measures', EC Tax Review 2010-4, p. 149-155, Kluwer Law International

G.J.H. van der Sangen (1999), Rechtskarakter en financiering van de coöperatie, W.E.J. Tjeenk Willink, Zwolle 1999, with a summary in English

G.J.H. van der Sangen, The European Company and the Involvement of Employees, in: S. Dumoulin et.al. (eds.), The European Company. Corporate Governance and Cross-border Reorganisations from a Legal and Tax Perspective, Boom Legal Publishers, The Hague 2005, p. 169-214

G.J.H. van der Sangen, ´Grensoverschrijdende reorganisaties van coöperaties', in: R.C.J. Galle (ed.), Handboek Coöperatie, Convoy Publishers: Dordrecht 2010, p. 982 and the 2010 SCE-Report, p. 78-79

S. Stevens, 'Tax Aid and Non-profit Organizations', EC Tax Review 2010-4, Kluwer Law International, p. 156-169

Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society, 5 October 2010, Euricse/Cooperatives Europe/Ekai

M.H. van der Woude, 'Coöperaties en mededingingsrecht', in: G.J.H. van der Sangen, R.C.J. Galle, P.J. Dortmond (eds.), De coöperatie, een eigentijdse rechtsvorm, Boom juridische uitgever: The Hague 2007, Chapter 8.

Legislation

The 2003 EU Corporate Governance Action Plan, COM (2003) 284 of 21 May 2003

Communication from the Commission to the Council and the European Parliament, The European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe, COM(2004)18, Brussels, 23 February 2004

Council Regulation (EC), No. 1435/2003 of July 2003 on the Statute for a European Cooperative Society (SCE), *OJ* L 207/1 of 18 August 2003

Directive 78/855/EEC of 9 October 1978, concerning mergers of public limited liability companies, *OJ* 295/36 of 20 October 1978

Council Directive 2003/72/EC of 22 July 2003, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, *OJ* L 207 of 18 August 2003

Directive 2005/56/EC on cross-border mergers of limited liability companies, *OJ* L310/1 25 November 2005

Regulation 1184/2006 (EC) applying certain rules of competition to the production of and trade in agricultural products

Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural product

Commission Regulation (EC), No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC-Treaty to *de minimis* aid

Commission Notice - Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty, para 23

Case Law General

ECJ 9 March 1999, C-212/97 (Centros), [1999] *ECR* I-1495

ECJ 30 September 2003, C-167/01 (Inspire Art), [2003] *OJ* C 275/10

ECJ 5 November 2002, C-208/00 (Überseering), [2002] *ECR* I-9919

ECJ 13 December 2005, C-411/03, (Sevic Systems AG), [2005] *ECR* I-10805

ECJ 2 May 2006, C-436/03 (European Parliament vs. Council of the European Union), [2006] *ECR* I-3733

Case Law on Competition

Case IV/31.735 New potatoes, 18 December 1987, *OJ* 1988 L 59, p. 25

Joint cases T-70/92 and T-71/92 Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten v Commission, 14 May 1997, *OJ* 1997 C 199, p. 22

Case IV/35.28 Sicasov, 14 December 1998, *OJ* 1999 L 4, p. 27

Joint cases C-101/07 P and C-110/07 P Coop de France bétail et viande and Fédération nationale des syndicats d'exploitants agricoles v Commission, 18 December 2008, *OJ* 2009 C 44, p. 7

Case C-137/00 The Queen v The Competition Commission, formerly The Monopolies and Mergers Commission, and Others, ex parte Milk Marque Ltd and National Farmers' Union, 9 September 2003, *OJ* 2003 C 264, p. 2

Joint cases C-319/93, C-40/94 and C-224/94 Hendrik Evert Dijkstra v Friesland Coöperatie BA and Cornelis van Roessel etc. v De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA and Willem de Bie etc. v De Coöperatieve Zuivelcoöperatie Campina Melkunie BA, 12 December 1995, *OJ* 1996 C 46, p. 3,

Case IV/31.204 Meldoc, 26 November 1986, *OJ* 1986 L 348, p. 50

Case IV/28.930 Milchförderungsfonds, 7 December 1984, OJ 1985 L 35, p. 35

Case C-399/93 H. G. Oude Luttikhuis etc. v Verenigde Coöperatieve Melkindustrie Coberco BA, 12 December 1995, *OJ* 1996 C 46, p. 4

Case 83/78 Pigs Marketing Board v Raymond Redmond, 29 November 1978, *ECR* 1978 p. 2347

Case C-280/93 Germany v Council, 5 October 1994, *ECR* 1994 p. I-4973

Case C-137/00 The Queen v The Competition Commission, formerly The Monopolies and Mergers Commission, and Others, ex parte Milk Marque Ltd and National Farmers' Union, 9 September 2003, *OJ* 2003 C 264, p. 2

Case C-22/01 Commission Decision of 15 December 2009 on support measures implemented by Spain in the agricultural sector following the increase in fuel prices, *OJ* L 235/1 of 24 June 2010

Joined Cases C-78/08 to C0-80/08 Ministero dell'Economia e della Finanze v Paint Graphos Sarl, 8 September 2011

Internet Sources

http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/social-economy/

http://www.oft.gov.uk/shared_oft/business_leaflets/competition_law/oft740.pdf

http://ec.europa.eu/agriculture/stateaid/leg/index_en.htm#specific