

PECOL and their Impact on Future Law-making on Cooperatives

Dr. Ger J.H. van der Sangen

The Principles of European Cooperative Law and their Impact on Future Law-making on Cooperatives

Dr. Ger J.H. van der Sangen

Department Business Law

Tilburg Law School

Outline

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- Some concluding remarks

The PECOL-project

*Principles of European Cooperative Law.
Principles, Commentaries and National Reports
Intersentia, Cambridge – Antwerp – Portland 2017*

Gemma Fajardo

Antonio Fici

Hagen Henry

David Hiez

Deolinda Meira

Hans-H. Münkner

Ian Snaith

Objective of PECOL

- ICA Principles are too general and descriptive
- Existing EU legislation is highly path dependent
- Translation of ICA Principles into specific normative legal principals

- Objective 1. PECOL as a legal cooperative identity, distinct from ‘companies’
- Objective 2. PECOL as a pattern for other enterprises, notably in social economy
- Objective 3. PECOL as a tool to enter into academic debate

Methodology

- Mapping of existing cooperative laws in Europa
 - Extensive National Reports on Finland, France, Germany, Italy, Portugal, Spain and United Kingdom
- On the basis of five central themes and subthemes, in order to make the results comparable
- Selecting a set of principles that capture the normative legal essence and the identity of the cooperative best
- Adding substantial comments on the principles

- ‘Soft law’?

A Framework of Legal Principles of European Cooperative Law

- Principles and values supported by the ILO, ICA and UN
- SCE-Statute
- Case-law by the European Court of Justice (Paint Graphos-case)
- Legal Principles of European Cooperative Law (PECOL)
- From general cooperative principles towards a translation into sets of legal principles on cooperatives as a specific legal business form distinct from 'companies'

Antithesis: objectives of business organizational law

- Well founded in law & economics literature
- Primarily to facilitate entrepreneurship by providing off the rack legal business forms
 - To lower transactions costs
 - To lower costs of solving potential agency problems
 - To offer default rules in case end-users are not in the position to ex ante contract for optimal provision
 - To safeguard 'the rule of law': to protect minority members and other stakeholders and prevent abuse of the corporate form
- Should cooperative law(s) mandate to encapsulate other interests than economic?
 - To be left to decide to the incorporators of the cooperative
 - Different statutes on cooperative law (traditional economic model versus general interest model)?

Discussion on the PECOL

- To be applied to all types of cooperatives
 - Pure economic, mutual cooperatives
 - Mutual cooperatives with social objectives
 - General interest cooperatives
- Irrespective sector or size of the cooperative
- The PECOL seem to question the rationale of the first type of cooperative

1. Definition and Objectives

- Economic activity without profit as the ultimate purpose
- Use of subsidiaries if necessary to satisfy the interests of members
 - Members must remain in ultimate control
 - Profits are allocated to the indivisible reserves
- General interest cooperatives (GIC)
- Cooperator members – non-cooperator members

- Principle of equal treatment
- Minimum extent and / or level of participation of cooperator members mandated
- Non-member cooperative transactions
 - Option to become a member
 - Profits are allocated to the indivisible reserves

2. Cooperative Governance

- Cooperator members' are in control
- What are the core decisions of the general meeting vis-à-vis the board?
- Principle of one man, one vote
 - Deviation to proportional voting rights, but not based on capital invested
 - But not on core decisions
- Role of the supervisory board/non-executives was not defined in PECOL
 - Conflict of interests
 - Independence
 - Expertise

3. Cooperative Financial Structure

- Non-cooperator members – investor shares are non transferable
- Rationale for mandatory indivisible reserves of profits from transactions with non-members is missing
- Rationale for mandate to distribute the residual net assets in accordance with the principle of disinterested distribution is missing

4. Cooperative Audit

- No comments
- This section should be applied by all cooperatives

5. Cooperation among Cooperatives

- Any mandate to cooperate between cooperatives is bound to be in conflict with the principle of autonomy and the freedom of association
- Financial inducements by government and state aid (ECJ Paint Graphos)
- PECOL strives for scale through the formation of secondary or federated cooperatives

Why are the PECOL important

- Legislators have not always an adequate understanding of the quintessential character of the cooperative – focus is on company law and financial markets law
- The SCE Statute itself is based on the SE Company which was based on the public firm
- The PECOL are guidelines to be taken into account and create awareness of the identity of the cooperative in:
 - Tax law
 - Competition Law
 - The scope of legal business forms
 - Fuels the debate on social economy and social enterprises in member-states that are unfamiliar with this concept (like the Netherlands)
 - The PECOL as the starting point of cooperative law as an autonomous field of law
 - Hagen (2018): A Legal Theory of Cooperative Law (statement at this conference)

Conclusion

- J.H. Boudewijnse 1899:

‘A genuine cooperative is a cooperative that in its endeavours adheres to the same principles once put into practice so brilliantly by the Pioneers of Rochdale.

A false cooperative concerns the type of association that, formally established as a cooperative and acknowledged as such by law, only strives for self-centred objectives.’

- L. Timmerman 2000 – ‘Anything goes...’