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## *Book Reviews*

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### **SOME REFLECTIONS ON THE BOOK “PRINCIPLES OF EUROPEAN COOPERATIVE LAW: PRINCIPLES, COMMENTARIES AND NATIONAL REPORTS”<sup>1</sup>**

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#### **Abstract**

This short article provides some reflections on the book “Principles of European Cooperative Law: Principles, Commentaries and National Reports.” These reflections are based on my personal experiences while conducting research in comparative cooperative law. In the debate among cooperative law scholars, this book definitely provides a useful methodical tool for the study of cooperative law.

#### **a) Introduction**

The first time I was confronted in detail with the Principles of European Cooperative Law (PECOL) was in 2013 when I had the pleasure of participating in a meeting of the Study Group on European Cooperative Law (SGECOL)<sup>2</sup> in Trento (Italy). At that time, I was affiliated with the University of Innsbruck (Austria) where I had started to write a monograph dealing with the Statute for the European Cooperative Society (SCE); basically, I compared how the SCE has to be applied in two different jurisdictions. This includes a comparison of two jurisdictions and the laws on cooperatives contained therein. The debates in Trento stimulated my curiosity about PECOL because at that time I was still looking for the proper method to conduct my comparative research. PECOL promised to be useful – and eventually, it was.

Then, in 2015, the draft version of PECOL was published and it was this document that I eventually used to finish my studies. Therefore, the observations in this article are primarily based on experiences with the draft PECOL. Still, I believe I can make some essential comments on PECOL as the draft version does not particularly differ from the final version as contained in the book.

The book “Principles of European Cooperative Law: Principles, Commentaries and National Reports” is divided into two parts. The first part, entitled Principles of European Cooperative Law and Commentaries, is divided into five chapters and deals with different aspects of cooperative law. These are the definitions and objectives of cooperatives, cooperative governance, cooperative financial structure,

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1. <sup>1</sup> Gemma Fajardo, Antonio Fici, Hagen Henry, David Hiez, Deolinda Meira, Hans-H. Münkner and Ian Snaith (eds.), Principles of European Cooperative Law. Principles, Commentaries and National Reports, Cambridge et al.: intersentia 2017, XII + 721 pp.

<sup>2</sup> Its members are Gemma Fajardo, Anton Fici, Hagen Henry, David Hiez, Deolinda Aparício Meira, Hans Münkner and Ian Snaith. The members of the study group come from different jurisdictions and have been chosen as representatives of jurisdictions with prominent cooperative traditions (Finland, France, Germany, Italy, Spain, Portugal and the United Kingdom).

cooperative audit, and cooperation among cooperatives. Every chapter contains commentaries that describe and analyse in detail the different rules. The second part contains national reports, using the structure as determined by PECOL. This clearly helps to grasp the method of PECOL. The reports refer to Finland, France, Germany, Italy, Portugal, Spain and the United Kingdom.

I used PECOL first of all from a methodological point of view and not to find information on national legislation. The national reports should be considered for obtaining information on national cooperative law structured according to PECOL. The reports give short but thoroughly developed insight into national cooperative law that might be used as a first reference and as a starting point for deeper analyses.

PECOL proved to be very useful as it helped me develop standards that can be used to compare the two different SCEs. Moreover, the specific information contained in the commentaries and which complete the principles, helps towards better understanding of the different solutions found in the various jurisdictions. It helps to broaden the understanding of how a cooperative works, why and where there are specific differences, and what that could imply when the law has to be applied.

This article is structured as follows: first, I make some short remarks on the methodology; then, I briefly outline the contents of chapters 1–5. In the conclusion, I stress the importance of this work.

My observations are not aimed at criticising the basic structure of PECOL nor its main findings as this would go far beyond the scope of a short review.

## **b) Methodology**

The basic idea of PECOL is, as the name states, to determine the general principles that identify, according to European cooperative traditions, the features of a cooperative. It is based on principles and rules that are found in different European jurisdictions and therefore constitutes some kind of common denominator, which ultimately defines what might be understood under the notion cooperative. From this, it clearly follows that PECOL is applicable to European cooperatives rooted in different European jurisdictions. It has to be specified that these principles are meta-principles.

PECOL describes cooperative legal norms. In doing so, PECOL addresses how cooperatives are actually organised and function. The final goal of these principles is to create principles in parallel with European and national law. With this, the authors try to establish patterns that might help to better understand cooperative law.

In this regard, three reasons for establishing PECOL are identified: first, PECOL shall establish a legal cooperative identity. In this context, it has been correctly criticised that the principles established by the ICA are too general. Then, PECOL should work as a pattern for other enterprises and therefore PECOL can be used as a model. Last and not least important, PECOL should be used as a tool to enter into academic debates.

PECOL is written in a clear way and therefore is helpful for deepening the reader's understanding. As such, this work is, in its way, already unique as up to now no other group of scholars has conducted a

similar task of such high quality. Concerning my research, the commentaries have proved to be very helpful for gaining a good understanding of how the various jurisdictions solve specific problems linked to cooperatives and how these different solutions have been assembled in order to find a common denominator.

### c) Main contents of chapters 1–5.

**Chapter 1** deals with the definition and objectives of cooperatives and contains five sections that refer to basic aspects of cooperatives. These are objectives, legal sources, membership requirements, cooperative transactions, and non-member cooperative transactions. However, it has been correctly affirmed that first of all a definition as such and its importance shall not be overemphasised. Even though single jurisdictions normally contain some kind of definition, they are not enough to compare cooperatives. In fact, if one considers how cooperatives work, then a definition can never contain all its distinguishing features.

This chapter contains some very detailed findings; for instance, how the notion of profit or for-profit is used in the different jurisdictions. Already here it becomes clear how difficult it is to identify common principles: as the different jurisdictions use notions that may differ in content, it was also necessary to find concepts that can be accepted by the authors and that fit their personal legal backgrounds.

PECOL does not contain any reference to the nature of members' needs, which however is quite often used in the single jurisdictions. In this regard, PECOL highlights that such a formula is often used to introduce —what PECOL defines—a general interest cooperative.<sup>3</sup> It is stressed that the concept of general interest cooperative is highly discussed in the various jurisdictions<sup>4</sup> and also reflects the different national approaches to cooperatives. The social function that some jurisdictions link to a cooperative is not acknowledged in the same way by other jurisdictions. Here, the concept of general interest cooperatives refers to cooperatives that go beyond the interests of the members, also fostering the needs of the community. For the traditional cooperative, PECOL uses the notion “mutual cooperatives.”

Regarding sources of cooperative law, PECOL stresses the problem of filling gaps in cooperative law by using company law instead of specific cooperative norms. It has been correctly stressed that these sources should only be used on the condition that they are compatible with the particular nature of a cooperative. With this, PECOL tries to safeguard the cooperative identity.

Chapter 1 continues by dealing with membership and its requirements; PECOL defines a minimum number of two members. Regarding requirements, they explicitly state that statutes cannot contain any discrimination or other artificial restrictions on membership. With this, PECOL tries to counterbalance, on one hand, the idea of open membership and, on the other hand, the specific needs of a cooperative. Regarding cooperative transactions with non-members, PECOL correctly stresses that these activities

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<sup>3</sup> For instance, Italian cooperative law uses the notion of social cooperative.

<sup>4</sup> For instance, this specific aspect is highly discussed among German scholars where this aspect has not been seen to properly fit the traditional understanding of what a cooperative is.

should not be prohibited in mutual cooperatives, adding that it is, however, necessary to limit these transactions in order to safeguard cooperative identity.

**Chapter 2** deals with issues of cooperative governance and contains six sections. The first section, (general principles of cooperative governance) also refers to recognised cooperative values and principles including cooperative social responsibility. This section then provides specific rules for the two different types of cooperatives (mutual cooperatives and general cooperatives).

Regarding open membership, PECOL requires a specific procedure, which, among other things, requires that specific reasons and appeal procedures be indicated in the case of refusal. Section 3 deals with obligations and rights of members and also determines specific obligations for investor members. In their case, participation in governance is restricted. This section also contains norms that deal with the collective rights of members.

Section 4 contains specific rules referring to direct member control, and generally requires that the members must be able to democratically control their cooperative. In order to foster democracy, the members' meetings can be organised as several separate meetings. Moreover, members may be represented by proxies or delegates.

The section then contains exceptions to the one member one vote rule. A specific provision determines that investor members and their influence shall be limited.

Section 5 contains rules regarding the governance structures. These are flexible enough to integrate the so-called collective model and a model where specific tasks are delegated to other organs/bodies. It is stressed that the collective model is best suited to small cooperatives. The possibility to adopt either the one-tier or two-tier system is fully in line with the specific traditional governance structures, which can be found in the different jurisdictions.

Again, a specific rule deals with cooperative values and principles and requires that the duties of the members of the organ include an obligation to adhere to these values and principles. PECOL also contains information on issues that should be decided on only by a qualified majority.

The last section deals with information rights of members and transparency requirements. **Chapter 3** deals with cooperative financial structure and contains eight sections. As a general principle, cooperatives perform economic activities without profit as the ultimate purpose. The commentaries highlight that the aim is not primarily profit but the mutualistic scope. Therefore, the financial structure is based on a logic of its own. This results not only from specific characteristics of the cooperative objective but also from the necessary obedience to values and principles.

Referring to cooperative share capital, PECOL explicitly allows cooperatives to be established without capital. It is stressed that share capital is instrumental in nature. Moreover, it contains references to the generally acknowledged principles of the variability of capital as well as distributed dissolution. Regarding capital, it is stressed that share capital remains equity/risk capital but also has many characteristics of debt capital. From this, it follows that share capital is the property of the cooperative and not a sum borrowed from its members.

Section 3.3 refers to the members' contribution to capital and provides for the possibility that new members are required to contribute more capital or to be paid interest on the capital, although only at a reasonable rate. It is explicitly determined that investor members cannot transfer their shares without permission from an organ of the cooperative. Any transfer of a member's shares is dependent on authorisation from the board. Moreover, there must be a member of the cooperative interested in acquiring shares or at least a potential member requesting admittance.

Regarding reimbursement of shares, PECOL determines that this can be at the nominal value and includes a portion of divisible reserves.

Section 3.4 contains specific details regarding reserves. It distinguishes between mandatory reserves and voluntary reserves. Mandatory reserves refer to legal reserves as well as other reserves required by law or statutes (for instance, reserve for cooperative education, training, and information). Voluntary reserves, as well as the legal reserves, are indivisible. In this context, it is correctly stressed that this principle shall help to counterbalance variable share capital as well as increasing the creditworthiness of the cooperative and protecting creditors. Moreover, it shall help to avoid speculative winding up. With it, some kind of common property is created and solidarity over generations shall be achieved. This section also contains specific rules regarding the establishment of the legal reserves and the establishment of the reserve for cooperative education, training, and information. Moreover, the rules deal with the way in which legal reserves can be used.

Chapter 3 contains rules regarding the limited liability of members and also allowing (by statutes) provision for liability of the member by guarantee (subject to a cap).

The next section deals with the important issue of economic results from cooperative transactions with members (surplus or losses in member cooperative transactions). The rules determine how the surplus can be used and, furthermore, specify cases when surplus cannot be distributed. Regarding remuneration, it is stressed that this is not a cooperative member's absolute right.

The last section refers to profits and other losses and the last section regards liquidation.

**Chapter 4** deals with the cooperative audit and contains four sections. As a general principle, cooperatives are obligated and entitled to be audited. This is clearly necessary in order to verify that cooperatives pursue their objectives. This chapter also contains special provisions for small cooperatives as well as special features of cooperative audits. Regarding the latter, it is stressed that special instruments have been developed by the cooperative movement or by cooperative science and they should be taken into consideration.

Regarding the scope and forms of cooperative audits, section 4.2 indicates the different aspects that are audited: for instance, the economic sustainability of the enterprise, the amount of the indivisible and divisible reserves, member participation and cooperative governance, and the volume of cooperative transactions with members and with non-members. Basically, cooperative auditors have to monitor operational efficiencies, understand the cooperative's ways of doing business and the value-oriented management, and assess the cooperative societies' concerns for the community (beyond CSR) and so on.

It is important that PECOL also stresses the differences between the audits of commercial enterprises and cooperative societies. In fact, there may be growing distance between members of their cooperatives; there is also a danger that the differences between the different legal forms of an enterprise are levelled. However, despite these trends, lawmakers should foster cooperative values, principles and specific rules for auditing cooperatives.

Section 4.3 refers to the audit entity and auditors, requiring that they have to be independent and have a specifically qualified cause for cooperative auditing. PECOL here refers to different entities that may audit cooperatives (for example, states, other public authorities, unions, federations of cooperatives, and private entities recognised by the state), and which are in line with the solutions found in the different jurisdictions.

Section 4.4 contains rules regarding the conclusion of a cooperative audit. With the report, the audit activities and findings are testified and shall also contain suggestions on how to deal with deficiencies. This section then contains rules regarding discussions of the report and how to deal with irregularities/deficiencies.

The **last chapter** deals with cooperation among cooperatives and contains three sections. Section 1 contains the general principles of cooperation among cooperatives. Cooperation is used to safeguard their autonomy. It is stressed that cooperation must reflect the nature of the cooperative enterprise. Accordingly, cooperation is the main factor in the success of a cooperative. This is preferred over concentration. PECOL also acknowledges that specific jurisdictions contain obligations to adhere to an audit union; this is however not necessarily a characteristic of cooperatives.

Cooperation is an issue on its own that needs further guidance. Here, one can use guiding principles such as equality, solidarity, and subsidiarity in order to sketch an appropriate framework. To the contrary, it is also stressed that cooperatives should not participate in structures that prejudice their autonomy or prejudice members' ultimate control of the cooperative.

Section 5.2 refers to different forms of economic cooperation including contractual relationships for the exchange of goods or services, a secondary cooperative, or cooperative group. The formulation establishment of contractual relationships refers to light institutionalisation such as joint ventures. It is highlighted that cooperation in secondary or higher degree cooperatives may require that the number of votes of members is not calculated according to the one member one vote principle. PECOL mentions specific exemptions in this regard.

The last section considers forms of social-political cooperation. These forms conduct activities such as representation, assistance and protection or education and training.

#### **d) Conclusion**

In this short article I have briefly described some aspects of PECOL without, however, having had the aim of criticising the basic structure of PECOL or its main findings. I have considered PECOL for what I have used it: a clear, developed framework containing principles that establish common (European)

denominators in order to better identify what a cooperative is. It contains all the relevant aspects of a cooperative and gives a good understanding about how a cooperative can be identified; using them made me understand that finding these common denominators is a rather difficult and complicated task.

It has been observed<sup>5</sup> that there is need for scientific research in comparative cooperative law. Indeed, PECOL is not only a step towards establishing a common framework for comparing national cooperative laws, but it also provides a clear and detailed structure that can be used to compare the specific issues without being too much bound on the structure contained in a national legal framework. With this, a general structure is created that can be used for making things comparable.

PECOL or better the book “Principles of European Cooperative Law: Principles, Commentaries and National Reports” is not only highly recommended for researchers dealing with comparative cooperative law but also for (not only young) scholars and students who are approaching, for the first time, the complex issue of cooperatives. It would be desirable that PECOL become an important point of reference for tasks such as this.

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<sup>5</sup> On this issue, see Miribung, *The European Cooperative Society*, forthcoming.





# International Journal of Cooperative Law

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